83-691

No.

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In the Supreme Court

OF THE

United States

OCTOBER TERM 1983

NADA NOVAKOVICH ALUEVICH,
Petitioner,

vs.

HARRAH'S, a Nevada corporation; HARRAH'S CLUB, a Nevada corporation; Holiday Inns, Inc., a Tennessee corporation; L. Mead Dixon; Lloyd Dyer; Romano Andreotti, Maurice Sheppard; Bob Contois; George Poore; Arthur Smith,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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QUESTIONS PRESENTED

1. Does the decision of the Nevada Supreme Court Excluding Commercial Business Lessees from the Protection of the Covenant of Good Faith and Fair Dealing Constitute an Invidious and Arbitrary Classification In Violation of the Fourteenth Amendment Mandate Prohibiting a Denial of Equal Protection of the Laws?

2. Does the Decision of the Nevada Supreme Court Withdrawing the Obligation of Good Faith and Fair Dealing From Commercial Business Leases Constitute an Unconstitutional Judicial Interference With the Obligation of Contracts in Violation of the Fourteenth Amendment Guarantee of Due Process of Law?

LIST OF PARTIES

Petitioner herein, Nada Novakovich Aluevich, was the Appellant in the Supreme Court of Nevada, and the Plaintiff in the Second Judicial District Court of the State of Nevada in and for the County of Washoe.

Respondents herein were the Respondents in the Supreme Court of Nevada and the Defendants in the Second Judicial District Court of the Sate of Nevada in and for the County of Washoe. The individual Respondents were officers, directors and employees of the corporate Respondents.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

OPINION BELOW

The Trial Court, at the conclusion of a jury trial on Plaintiff's Complaint against the Defendants arising from the alleged improper and wrongful termination of a commercial business lease, granted the motion of the Respondents for a directed verdict dismissing Petitioner's claim for tortious breach of an implied duty of good faith and fair dealing. The Nevada Supreme Court affirmed such directed verdict in its decision filed and entered on March 31, 1983, which is reported in the Official Reports, 99 Nev. ....., Adv. Op. No. 660 P.2d 986 (1983), and is reprinted herein in the

Appendix. A timely Petition for Rehearing was denied without opinion by Order filed and entered July 29, 1983, and the decision became final by the issuance of the Remittitur to the Trial Court on August 8, 1983. Copies of the Petition for Rehearing, Order Denying Rehearing and the Remittitur are reprinted herein in the Appendix.

JURISDICTION

The decision of the Nevada Supreme Court of which review by certiorari is sought herein was made and entered on March 31, 1983 and became final by the denial of a petition for rehearing and the issuance of the Remittitur on August 8, 1983. The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1257(c).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

ARTICLE I, Section 10 of the United States Constitution:

"No State shall . . . pass any . . . Law impairing the Obligation of contracts, . . .

AMENDMENT FOURTEEN, United States Constitution:

> "Section 1. "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

N.R.S. 104.2104(1):

"1. 'Merchant' means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill."

N.R.S. 104.1201(19):

"19. 'Good faith' means honesty in fact in the conduct or transaction concerned.

N.R.S. 104.1203:

"Every contract or duty within this chapter imposes an obligation of good faith in its performance or enforcement"

N.R.S. 104.2103(1)(b):

"(b) 'Good faith' in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."

N.R.S. 104.1102(3):

"3. The effect of provisions of this chapter may be varied by agreement, except as otherwise provided in this chapter and except that the obligations of good faith, diligence, reasonableness and care prescribed by this chapter may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable."

N.R.S. 104.1208:

"A term providing that one party or his successor in interest may accelerate payment or performance or

require collateral or additional collateral 'at will' or 'when he deems himself insecure' or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised."

STATEMENT OF THE CASE

Petitioner, Nada Novakovich Aluevich, is a Reno attorney who, from 1968 to 1978, successfully operated Luke's Gift Shoppe and Luke's Nevada Photo Service at the northwest corner of Second and Virginia Streets on the ground floor of the Byington Building under a succession of leases from the Respondent, Harrah's Club, with net profits in 1976 of $301,000.00, and 1977 of $310,000.00. All of the leases prior to 1978 provided for a flat monthly rental fee to be paid by the Petitioner. On June 30, 1977, Petitioner notified Harrah's of her intention to renew the lease. During the lease renewal negotiations the Respondent revealed that it was considering the operation of its own gift shop business on the Petitioner's business premises, and requested confidential, gross income, and sales volume data which Petitioner adamantly refused to give. As a result, the Respondent proposed altering the rental agreement of the prior leases to provide for a percentage lease, which arrangement would necessarily require Petitioner to disclose gross income and sales volume information. Given no real choice in the matter, the Petitioner agreed to renew the lease on a percentage rental basis, but requested the deletion of a provision permitting Harrah's to terminate the lease on a unilateral 90-days notice, which provision had been in the

prior leases. She was assured by Respondent that the provision was non-negotiable and would have to remain in the lease, but that it would only be exercised if Harrah's could put unlimited gaming on the premises, or if she permitted the premises to become cluttered and unkempt. In reliance upon these assurances, the Petitioner reluctantly acceded to the terms of the lease that Harrah's insisted upon, and the lease was renewed upon the expiration of the prior lease in February of 1978. Thereafter, unknown at that time to Petitioner, Harrah's continued to pursue the feasibility of operating its own gift shop at the Petitioner's location, thereby "taking over" the Petitioner's successful, lucrative business operation, and made written projections estimating their "profit potential" from operating Luke's Gift Shoppe as a Harrah's entity, with recommendation that Harrah's "take over this operation," and determined that if it took over Petitioner's business it would show a before tax profit of $800,000. Harrah's personnel admitted that the Petitioner ran a good store and was a good tenant. Seven months after the renewal of the lease and the disclosure of the financial and operational data to Harrah's by Petitioner, Respondent gave Petitioner a notice to terminate, invoking the unilateral 90-day termination clause. Petitioner ultimately vacated the premises pursuant to the notice and a 30-day extension thereof. After Petitioner vacated the premises, Harrah's opened its own gift shop on the premises. Petitioner brought an action against the Respondents for wrongful termination of her lease agreement, alleging a cause of action for damage, inter alia, for breach of the covenant of good faith and fair dealing. At the trial of the action before a jury, the Trial Court granted

a directed verdict in favor of Respondents and would not let the jury consider the claim for breach of the covenant of good faith and fair dealing.

Petitioner appealed the granting of the directed verdict to the Nevada Supreme Court which rendered its Decision (Appendix A) holding that although the claim arising from the breach of the covenant of good faith and fair dealing was recognized in Nevada, the fact that Appellant was a successful and sophisticated businessperson and attorney in the relationship of lessee to a commercial lessor obviated the "special element of reliance" and therefore the cause of action was not available. In essence, the Court held that a commercial business lessor dealing with a sophisticated businessperson was immune from liability for bad faith. The dissenting opinion, authored by Mr. Justice Springer, pointed out that there was no reason to restrict the cause of action in the manner suggested by the majority, pointing out that the Court had previously recognized that the duty of good faith and fair dealing exists in *every* contract, and had previously been applied by the Court to the enforcement of a warehouse lien in *Mitchell v. Bailey & Selover*, 96 Nev. 147, 605 P.2d 1138 (1980).

The Petitioner filed a Petition for Rehearing in the Nevada Supreme Court, pointing out therein that its Decision created an arbitrary immunity for a certain class of business persons, which classification did not serve a reasonable purpose and was invidious and unreasonable. The Petition pointed out that the covenant of good faith and fair dealing had been legislatively endorsed by the Nevada Legislature in the adoption of the Uniform Commercial Code,

and legislatively had been extended to every type of business relationship between sophisticated business people that is encompassed within the provisions of the Code, including lessees, where the leases could be deemed to be security devices. In fact, the Petitioner pointed out, the Legislature had deemed such duty so important and so integral a part of such business relationships that it legislatively precluded the parties to such relationships to bargain it away. (N.R.S. 104.1102(3)). In addition, the Court had judicially recognized and enforced such duty in non-Commercial Code situations, recognizing that the duty existed in every contract. As a result, the Petition for Rehearing contended, the exclusion of commercial business lessors from liability for breach of such duty operated as an unreasonable classification which denied to the Petitioner the equal protection of the laws guaranteed to her by the Fourteenth Amendment to the United States Constitution. The Petition for Rehearing further contended that the fact that the parties were sophisticated and knowledgable business people was precisely the reason why they would have entered into the contract in reliance upon the good faith of each other, and why the Petitioner would accept the assurances of the Respondent as to the limited purposes for which the unilateral 90-day termination clause would be exercised, and that the Supreme Court's decision impaired the obligation of that contract, which, within the contemplation of the parties, included the obligation of good faith and fair dealing.

The Nevada Supreme Court denied the Petition for Rehearing without opinion on July 29, 1983, and issued its Remittitur on August 8, 1983.

STAGES AT WHICH THE FEDERAL QUESTIONS WERE RAISED AND PRESERVED

The federal questions in this case arise from the withdrawal of the covenant of good faith and fair dealing from the contractual relationships between the parties. The withdrawal of the claim was first raised at the trial level when the Trial Court withdrew the cause of action based on such obligation from the consideration of the jury by a directed verdict. The existence of such obligation as an incident of the contractual relationship of the parties was raised and argued in the direct appeal to the Nevada Supreme Court. The Nevada Supreme Court's decision held that it was proper to withdraw such obligation from the parties contract based on a judicial classification that parties who are sophisticated and knowledgable business people are not entitled to rely upon the good faith and fair dealing of the persons with whom they contract, and therefore such persons with whom they contract are immune from liability for breach of the obligation of good faith and fair dealing. The Petitioner challenged this classification as in violation of the Equal Protection Clause and the Due Process of Law Clause by reason of the violation of Article I, Section 10 of the United States Constitution by Petition for Rehearing.

ARGUMENT

I

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE DECISION OF THE NEVADA SUPREME COURT VIOLATED THE MANDATE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY DENYING TO THE PETITIONER THE EQUAL PROTECTION OF THE LAWS

Petitioner, in her case against Respondent, sought to invoke the law of the State of Nevada granting a cause of action to a contracting party who suffers injury and damages by reason of the bad faith of the other contracting party in acting to defeat the purposes of the contract. This law is based upon the determination that implicit in *every* contract is an implied covenant of good faith and fair dealing, the breach of which is a tort which gives rise to a liability for consequential damages caused by such breach, and, in appropriate cases, punitive damages. (*Communale v. Traders & Gen. Ins. Co.*, 328 P.2d 198, 200 (Cal. 1958); *Gruenberg v. Aetna Ins. Co.*, 510 P.2d 1032, 1036 (Cal. 1975), adopted for the State of Nevada in *U.S. Fidelity v. Peterson*, 91 Nev. 617, 540 P.2d 1070 (1975)).

The Nevada Supreme Court, in denying the availability of a cause of action for breach of the covenant of good faith and fair dealing to Petitioner, in a case where there is no contention that the Petitioner did not establish a *prima facie* case entitling her to relief on such cause of action, held that because the Petitioner was a sophisticated and knowledgable business person, her case lacked that "special element of reliance" implicit in such cause of

action. It is respectfully submitted that in so holding, the Nevada Supreme Court has judicially carved out an immunity from liability for that class of contracting parties who enter into commercial business lease contracts with sophisticated lessees, and that there is no reasonable basis for such classification under the law of the State of Nevada. The fact that a contracting party is sophisticated and knowledgable is not a reasonable basis for denying that person the benefit of the covenant of good faith and fair dealing. The Nevada Legislature so recognized in its enactment of the Uniform Commercial Code, where the policy that sophisticated, knowledgable business people, with experience and skill in commercial transactions, should be bound to and entitled to rely upon the legal duty of good faith and fair dealing, with each other as well as with others. "Merchants" are defined in the Code as persons having such qualities of knowledge, experience and skill (N.R.S. 104.2104), and the Code specifically provides that, in the case of a "merchant", good faith means honesty in fact and the observance of reasonable commercial standards of fair dealing. (N.R.S. 104.2103(1)(b)). The Code further provides that the obligation of "good faith", defined as honesty in fact, may not be bargained away by anyone, including sophisticated, knowledgable and experienced business people. (N.R.S. 104.1102(3)). And with a contract such as that herein involved, which provides one of the parties a right exercisable "at will", the Code provides such right may only be exercised in "good faith", and that the party exercising such right has the burden of proving such good faith. (N.R.S. 104.1208). Therefore, under the Uniform Commercial Code in Nevada, every contract or transaction between persons, whether sophisti-

cated, knowledgable and experienced, or not, which involves the sale of goods (N.R.S. 104.2101 et seq.), involves commercial paper (N.R.S. 104.3101 et seq.), involves bank deposits and collections (N.R.S. 104.4101 et seq.), involves letters of credit (N.R.S. 104.5101 et seq.) which involves bulk transfers (N.R.S. 104.6101 et seq.), involves warehouse receipts, bills of lading and documents of title (N.R.S. 104.7101 et seq.), involves investment securities (N.R.S. 104.8101 et seq.) and which involves secured transactions (N.R.S. 104.9101 et seq.) unconditionally contains within it an implied covenant of good faith, imposed by law and made non-waivable. Thus, the fact that a contracting party is sophisticated, knowledgable or experienced is not a reasonable basis for withholding the protection of such covenant from that party when the party enters into a contractual relationship.

On the same day the Nevada Supreme Court decided Petitioner's case, it also rendered its Decision in *State Farm Fire & Casualty Company v. All Electric, Inc.*, 99 Nev. ....., Adv. Op. No. 49, 660 P.2d 995 (1983) in which it held as unconstitutional, in violation of the Fourteenth Amendment's mandate commanding that all citizens are entitled to the Equal Protection of the law, a statutory provision limiting liability for design and construction defects to a period of six years after completion of construction (regardless of when the cause of action accrued), which also denied the protection of such immunity from liability to owners and occupiers of the premises and material suppliers. The Court therein recognized that classification must be reasonable, citing *Morey v. Doud*, 354 U.S. 457 (1957), and that where the classification was not suspect on its face and did not involve a fundamental

right (such as classifications based on race, creed, or involving rights of liberty), the role of the Court is to determine whether the classification bears a rational relationship to the legislative purpose sought to be effected, citing *Dandridge v. Williams*, 397 U.S. 471 (1970)). The Court, relying on the reasoning of precedents from other jurisdictions, determined that the classification was unreasonable because there was no rational basis for granting an immunity to the designer, contractor, architect and engineer which was not granted to the materialman and the owner or occupier. In so holding, the Nevada Court acknowledged the confusion among the states as to the effect of the action taken by this Court in dismissing the appeal in *Carter v. Hartenstein*, 455 S.W.2d 918 (Ark. 1970) for want of a substantial federal question, which appeal involved a challenge on equal protection grounds to a similar statute. The Nevada Supreme Court therein pointed out, in footnote 2:

> "The statute in *Carter* was similar to that in issue in the immediate case and the equal protection challenge was similar as well. The Arkansas Supreme Court upheld the validity of the statute and appeal was taken to the United States Supreme Court. There, the appeal was dismissed for lack of a substantial federal question. While such a dismissal has limited precedential value, the dismissal is generally a binding adjudication of the merits. Hicks v. Miranda, 422 U.S. 332 (1975). Nevertheless, at least six jurisdictions have held similar statutes to be unconstitutional since the *Carter* dismissal in 1971. Obviously, those jurisdictions do not believe the summary disposition in *Carter* is binding. We agree. Although *Carter* may be very persuasive, we do not believe it is dispositive of this appeal. See Justice Brennan's concurrence in Mandel v.

> Bradley, 432 U.S. 173 (1977), (state courts should give appropriate but not conclusive weight to summary dispositions)."

The Court also pointed out in footnote 3 that other states have held such statutes to be unconstitutional, although on grounds different than equal protection.

The Nevada Supreme Court declined to follow the *Carter* case, and concluded:

> "After thoroughly considering this important question, we are satisfied that the better reasoned cases are those which have struck such statutes as being constitutionally infirm because they improperly grant immunity from suit to a certain class of defendants, without a reasonable basis for that classification. (Citations omitted)"

Yet, what the the Court held the Legislature could not do in *State Farm v. All Electric, Inc., supra,* that is, grant immunity to a certain class of defendants without a reasonable basis for that classification, it, itself, did the very same day, without legislative sanction, in Petitioner's case, in granting immunity to a class encompassing commercial business lessors, while virtually every other type of contractual relationship remains subject to the duty of good faith and liability for breach thereof. The mandate of the Fourteenth Amendment prohibits "States" from denying the Equal Protection of the Laws to any citizen; "States" just as effectively deny such equal protection by an unreasonable judicial classification as they do by an unreasonable legislative classification, and the result is just as devastating to the citizen who is denied the equal protection of the laws as a result thereof.

It is therefore respectfully submitted that the United States Supreme Court should grant certiorari to review the Decision of the Nevada Supreme Court to determine whether a classification giving a class of defendants immunity from civil liability without a reasonable basis for such classification violates the Fourteenth Amendment to the United States Constitution, and to clarify the confusion which has occurred among the states on this issue, as observed by the Nevada Supreme Court, as a result of the dismissal of the appeal in *Carter v. Hartenstein*, 401 U.S. 901 (1971).

II

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE WITHDRAWAL OF THE COVENANT OF GOOD FAITH FROM COMMERCIAL BUSINESS LEASES IS AN IMPAIRMENT OF THE OBLIGATION OF A CONTRACT IN VIOLATION OF THE DUE PROCESS OF LAW CLAUSE OF THE FOURTEENTH AMENDMENT

U. S. Fidelity v. Peterson, 91 Nev. 617, 540 P.2d 1070 (1975) which adopted the reasoning of the California decisions (*Communale v. Traders & Gen. Ins. Co.*, 328 P.2d 198, 200 (Cal. 1958); *Gruenberg v. Aetna Ins. Co.*, 510 P. 2d 1032, 1036 (Cal. 1975)) that there is implicit in every contract a covenant of good faith and fair dealing upon which the parties to the contract may rely, and for the breach of which the non-offending party may recover consequential damages, was decided in 1975. In 1978, when the lease herein involved was entered into, the Petitioner, being a sophisticated business person and an attorney, was very much aware of the law regarding good faith and fair

dealing, and when she objected to the 90-day termination clause, she obtained the assurance of the Respondents that it was for an extremely limited purpose and would only be exercised for such purpose. She had the right to believe that the good faith of the Respondents would be measured by such assurance, and therefore the right to rely thereon as much as if it were an explicit term of the contract. It is well established that laws which are effective at the time of the making of a contract enter into and form a part of it as fully as if they had been expressly referred to or incorporated in its terms. (*Farmers and Merchants Bank v. Federal Reserve Bank,* 262 U.S. 649, 43 S.Ct. 651, 67 L.Ed. 1157, 30 A.L.R. 635; *Northern Pacific Ry. v. Wall,* 241 U.S. 87, 36 S.Ct. 493, 60 L.Ed. 905; *Warren v. United States,* 68 Ct. Cl. 634, certiorari denied, 281 U.S. 739, 50 S.Ct. 346, 74 L.Ed. 1154.)

It is therefore respectfully submitted that the covenant of good faith and fair dealing, being the law in effect at the time the Petitioner and Respondents entered into the lease contract, was a binding term of the contract, and a binding legal duty arising from the contractual relationship imposing respective obligations on the parties. Article 1, Sec. 10 of the United States Constitution prohibits any state from passing a law impairing the obligation of a contract. Although Article 1, Section 10 by its terms refers to legislative enactments, this Court has previously held that a violation of Article 1, Section 10 (by an ex post facto judicial application of a change in the law) by a Court accomplishes indirectly what is prohibited directly, and is thus a violation of the Due Process Clause of the Fourteenth Amendment. (*Bouie v. City of Columbia,* 378 U.S. 347 (1964). The

judicial withdrawal of the obligation of good faith and fair dealing in the Petitioner's case clearly impaired that obligation of the contract to Petitioner's damage. Petitioner relied on the existence of such obligation when she entered into the contract, and was entitled to do so. The impairment of that obligation by the Nevada Supreme Court resulted in Petitioner being deprived of substantial property rights, which the evidence at trial established to be a million eight hundred thousand dollars, without Due Process of Law. Petitioner respectfully submits that certiorari should be granted to review the Decision of the Nevada Supreme Court to correct this obvious and unwarranted injustice.

CONCLUSION

For the reasons set forth above, Petitioner, Nada Novakovich Aluevich, respectfully requests this Court to grant the Writ and reverse the Decision of the Nevada Supreme Court.

Respectfully this 24th day of October, 1983.

PETERSEN & PETERSEN
By /s/ Steven F. Petersen*
NADA NOVAKOVICH
NICHOLAS J. DRAKULICH
Attorneys for Petitioner

**Counsel of Record*

(Appendices follow)

Appendix A

In the Supreme Court of the State of Nevada
No. 13533

Nada Novakovich Aluevich,
Appellant,

v.

Harrah's, a Nevada Corporation;
Harrah's Club, a Nevada Corporation;
Holiday Inns, Inc., a Tennessee Corporation;
L. Mead Dixon; Lloyd Dyer; Romano Andreotti;
Maurice Sheppard; Bod Contois; and George Poore,
Respondents.

[Filed Mar. 31, 1983]

Opinion

By the Court, Manoukian, C. J.:

This appeal concerns the scope of an implied covenant of good faith and fair dealing. Finding that courts have not extended such a covenant to commercial leases between two sophisticated parties who are not otherwise bound by any special element of reliance or fiduciary duties, we affirm the directed verdict dismissing appellant's claim for tortious breach of an implied duty of good faith and fair dealing.

Appellant is a Reno attorney who, from 1968 to 1978, operated Luke's Gift Shoppe and Luke's Nevada Photo Service at the northwest corner of Second and Virginia Streets on the ground floor of the Byington Building. Appellant occupied that building under a succession of subleases from Harrah's Club. Since 1968, all of the subleases

between appellant and Harrah's Club have contained a provision which granted Harrah's Club "the option to cancel this lease upon ninety (90) day's written notice to [appellant]." Appellant now claims that throughout all lease negotiations, the respondents orally assured her that the ninety day termination privilege would not be exercised unless she operated unrestricted or unlimited gaming in the gift shop or the shop became cluttered with too much merchandise. None of those restrictions, however, appeared in any of the written lease agreements; the termination privilege contained in all of the subleases was absolutely unqualified.

On October 2, 1978, pursuant to the termination privilege contained in the 1978 sublease, Harrah's served notice on appellant of its intention to cancel the sublease. The effective date of cancellation was January 1, 1979, but Harrah's granted an extension until February 29, 1979. Appellant vacated the premises on that date. Following the cancellation, appellant filed a complaint which alleged numerous claims for relief. Because all other claims are meritless, we shall address only appellant's contentions regarding the tort action for breach of an implied duty of good faith and fair dealing.

The court below held that no genuine issue as to any material fact existed regarding the "bad faith" claim and granted a directed verdict, pursuant to NRCP 50(a), in respondents' favor. Appellant argues that the lower court's ruling was erroneous, in that, evidence was presented which showed that respondents terminated the 1978 sublease to usurp a profitable business that she had operated on the demised premises for several years.

In U. S. Fidelity v. Petersen, 91 Nev. 617, 540 P.2d 1070 (1975), this court recognized a cause of action in tort for the breach of an implied covenant of good faith and fair dealing where an insurer fails to deal fairly and in good faith with its insured by refusing, without proper cause, to compensate its insured for a loss covered by the policy. *Id.* at 620, 540 P.2d at 1071. Appellant requests this court extend such a cause of action to her case. The tort recognized in *Petersen*, however, arose out of a need for special protection of insureds in light of the quasi-public nature of the insurance industry and the element of an insured's heavy reliance upon the insurer's credibility. *See* Comment, *The New Tort of Bad Faith Breach of Contract: Christian v. American Home Assurance Corp.*, 13 Tulsa L. J. 605, 613-616 (1977-78). The dissent correctly notes that an implied covenant of good faith and fair dealing has mainly been implied in contractual relations which involve a special element of reliance such as that found in partnership, insurance and franchise agreements. The case relied on by the dissent concerned a situation where one party has traditionally held vastly superior bargaining power—the termination of a salesperson's "at will" employment contract. Fortune v. National Cash Register Co., 364 N.E.2d 1251, 1253 (Mass. 1977).

In the present case, the appellant is an experienced businessperson and an attorney. The unqualified termination privilege was the subject of negotiations for ten years. Although the cancellation privilege remained unqualified, appellant continued to renew the subleases. The relationship between appellant and respondent was that of lessee and lessor. We do not find, in the present case, the special

element of reliance which prompted this court in *Petersen* to recognize a cause of action in tort for the breach of an implied covenant of good faith and fair dealing.

We have considered the remaining assignments of error and find them to be without merit. Therefore, the lower court's involuntary dismissal and directed verdict and the jury's verdict in respondents' favor are affirmed.

/s/ MANOUKIAN, C. J.
Manoukian

We concur:

/s/ MOWBRAY, J.
Mowbray

/s/ STEFFEN, J.
Steffen

/s/ ZENOFF, SR., J.[1]
Zenoff

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[1]The Honorable David Zenoff, Senior Justice, was assigned to participate in this case by the Chief Justice, pursuant to Nev. Const. Art. 6, § 19.

SPRINGER, J., dissenting:

There is evidence in this record that respondents, Harrah's, Harrah's Club and Holiday Inns, Inc. did not act in good faith in performance and enforcement of the March 1, 1978, lease agreement. I would remand this case to the trial court for jury consideration of appellant's claim for breach of implied covenant of good faith and fair dealing.

Because we are reviewing a verdict granted pursuant to NRCP 50(a), we must view the evidence and all inferences in the light most favorable to the party against whom the motion was made. Connell v. Carl's Air Conditioning, 97 Nev. 436, 438, 634 P.2d 673 (1981); Drummond v. Mid West Growers, 91 Nev. 698, 542 P.2d 198 (1975).

Since 1968, Aluevich operated a gift shop and photography business under a succession of subleases from Harrah's. All of the leases before 1978 provided for a flat monthly rental fee to be paid by Aluevich. On June 30, 1977, Aluevich notified Harrah's of her intention to renew the 1973 lease. During lease renewal negotiations Harrah's disclosed that it was considering establishing its own gift shop business on the premises and requested sales data from Aluevich. Aluevich refused to provide this information. Aluevich introduced at trial a Harrah's memorandum, circulated before the execution of the 1978 renewal, in which mention was made of a recommendation to "take over this operation when the lease expires in February, 1978." Another pre-lease memorandum in the record refers to the "profit potential from operating Luke's Gift Shoppe as a Harrah's entity."

Aluevich claims that to obtain the gross and the net sales figures of her business, Harrah's proposed the negotiation of a percentage lease in which these figures would neces-

sarily have to be disclosed. Aluevich accepted this proposal. The lease as renewed provided for rental on a percentage basis and for disclosure of profit figures. It also contained a provision which permitted Harrah's to terminate the lease on 90 days' notice to Aluevich. According to Aluevich, however, agents of Harrah's told her that the termination right would be exercised only if Aluevich were to put gaming into the lease premises or if the premises were allowed to become cluttered or unkempt.

After the renewal in March of 1978, Harrah's continued to move toward takeover by making projections of anticipated profits from a proposed Harrah's operation in the subject area. Harrah's admitted it had, prior to termination, projected an annual pre-tax profit of $800,000 by operation of a business similar to that of Aluevich. Harrah's also admitted that Aluevich's lease was terminated because Harrah's earnings and projected earnings were falling. Lloyd Dyer, president of Harrah's in 1978, testified that Aluevich was a good tenant and ran a good store.

Seven months after execution of the lease and after Aluevich had disclosed the closely guarded profit and income figures, Harrah's gave termination notice under the 90-day clause. Respondents have not alleged that Aluevich defaulted on any of the provisions of the lease. Aluevich vacated pursuant to the notice and Harrah's proceeded, as it had previously indicated, to conduct a retail business in the subject premises.

In sum, Aluevich's position is that a jury could have reasonably inferred that Harrah's did not deal fairly with Aluevich in that it had no intention of allowing Aluevich to remain on the premises for the duration of the lease term but rather that its intention was to obtain Aluevich's busi-

ness figures and then take over the business at an early and convenient date.

Harrah's position is not that Aluevich has failed to present a case which would, if believed, form the basis for a bad faith action against Harrah's. Rather, Harrah's argues that an action for breach of an implied duty of good faith and fair dealing will lie only with relation to insurance and franchise contracts. Also, Harrah's contends that the parol evidence rule prohibits consideration of any oral representations regarding termination to Aluevich's lease which contradict the clear meaning of the unqualified termination clause.

Although many of the cases which recognize an implied covenant of good faith and fair dealing involve insurance and franchise contracts, I see no reason to restrict actions arising therefrom to these kinds of contracts. In U.S. Fidelity v. Peterson, 91 Nev. 617, 540 P.2d 1070 (1975), this court imposed a duty on insurers to deal fairly and in good faith with their insureds. That duty arose from the premise that an implied covenant of good faith and fair dealing exists in *every* contract, that neither party should be permitted to do anything which will injure the right of the other to receive the benefits of the agreement. *See* Silberg v. California Life Insurance Co., 521 P.2d 1103, 1108 (Cal. 1974); Gruenberg v. Aetna Ins. Co., 510 P.2d 1032, 1036 (Cal. 1975); Communale v. Traders & Gen. Ins. Co., 328 P.2d 198, 200 (Cal. 1958). In Mitchell v. Bailey & Selover, 96 Nev. 147, 605 P.2d 1138 (1980), this court applied the obligation of good faith and fair dealing contained in the U.C.C., *see* NRS 104.1203, to the enforcement of a warehouseman's lien. Under these rulings it is indeed difficult to maintain such a restricted approach to bad faith actions

as is taken by the majority. *See* Restatement (Second) of Contracts § 205 (1981).

A leading example of recognition of this type of action may be found in Fortune v. National Cash Register Company, 364 N.E.2d 1251 (Mass. 1977), in which it was held that although a salesman's employment contract was terminable at will, there was still an independent action for breach of the implied obligation of good faith where the salesman was found to have been discharged in order to avoid payment of a bonus. In *Fortune* the salesman's employment was terminated shortly after his company received a $5,000,000 order from his territory. The jury found that the defendant acted in bad faith when it terminated the salesman's employment and awarded damages. The Supreme Judicial Court of Massachusetts upheld the jury verdict, recognizing the general right of an employer to terminate "at will" but also recognizing an independent breach of contract action because the "parties to contracts and commercial transaction must act in good faith toward each other." This holding is buttressed by Professor Summer's observation that when parties agree to an "at will" termination power, they usually agree merely to the grant of a power and not also to the grant of a power to abuse that power. R. Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code,* 54 Va.L.Rev. 195, 197-98 (1968).

In deciding this case it is not necessary to pronounce any general rules as to when and under what contractual circumstances an action for breach of the duty of good faith and fair dealing would lie. In contract law, good faith is an "excluder." "It is a phrase without general meaning of its own and serves to exclude a wide range of hetero-

geneous forms of bad faith. In a particular context the phrase takes on a specific meaning, but usually this is only by way of contrast with the specific form of bad faith actually or hypothetically ruled out." *Id.* at 201. "Good faith, then, takes on specific and variant meanings by way of contrast with the specific and variant forms of bad faith which, [based on the law's standard of fairness which all people ought to observe in their dealings with each other], judges decide to prohibit." *Id.* at 202-04. I would hold only that in this case a jury would be justified, if it accepted the position of Aluevich, in finding that there was an obligation of good faith and fair dealing imposed on Harrah's in the performance and enforcement of the subject lease contract, that Harrah's breached that obligation, and that Harrah's was responsible for damages resulting from such breach. *Cf. Fortune,* 364 N.E.2d at 1257.

With regard to Harrah's contention that parol evidence cannot be used to contradict the clear terms of the termination clause, I would simply say that the evidence outlined above is offered for the purpose of supporting an independent action for violation of the implied covenant or obligation of good faith. Such evidence does not serve to cancel or alter the termination privilege. Assuming an unqualified right on the part of Harrah's to terminate the lease, the question remains as to whether the conduct complained of, if believed by a jury, would support an action for damages against Harrah's for violation of the implied covenant of good faith and fair dealing. I believe it does and would reverse on this issue and remand for trial.

/s/ SPRINGER, J.
Springer

Appendix B

In the Supreme Court of the State of Nevada
No. 13533

Nada Novakovich Aluevich,
Appellant

vs.

Harrah's, a Nevada corporation; Harrah's Club, a Nevada corporation; Holiday Inns, Inc., a Tennessee corporation; L. Mead Dixon; Lloyd Dyer; Romano Andreotti; Maurice Sheppard; Bob Contois; and George Poore,
Respondents

[Filed April 15, 1983]

Petition for Rehearing

Comes now the Appellant, Nada Novakovich Aluevich, and hereby petitions this Court to grant a rehearing on the above-entitled appeal pursuant to the provisions of Rule 40, Nevada Rules of Appellate Procedure, upon the grounds that the opinion of this Court as rendered on March 31, 1983, misapprehends material points of law pertinent to the scope, purpose and applicability of the covenant of good faith and fair dealing which results in an unjustifiable extinguishment of a remedy to a limited class of litigants. This petition is made upon the further ground that rehearing under circumstances herein presented will promote substantial justice. (N.R.A.P., Rule 40(c)(iii))

This Petition for Renearing is based upon the Record on Appeal on file herein, the Decision of this Court ren-

dered on March 31, 1983, and the points and authorities submitted herewith in support of this petition.

Dated this 14th day of April, 1983.

Respectfully submitted

/s/ Nicholas J. Drakulich
and
/s/ Nada Novakovich
Attorneys for Appellant

In the Supreme Court of the State of Nevada
No. 13533

Nada Novakovich Aluevich,
Appellant,

v.

Harrah's, a Nevada Corporation;
Harrah's Club, a Nevada Corporation;
Holiday Inns, Inc., a Tennessee Corporation;
L. Mead Dixon; Lloyd Dyer; Romano Andreotti;
Maurice Sheppard; Bob Contois; and George Poore,
Respondents.

Points and Authorities in Support of Petition for Rehearing

Comes Now the Appellant, Nada Novakovich Aluevich, and hereby submits the following points and authorities in support of the grounds stated in her Petition for a Rehearing in the above-entitled appeal:

A. Rehearing Should Be Granted Because This Court's Opinion Misapprehends Material Points of Law Pertinent to the Scope, Purpose and Applicability of the Covenant of Good Faith and Fair Dealing.

The opinion of this Court affirming the orders and judgment of the Trial Court which were appealed from is premised upon the determination, stated in the opinion, that:

> "Finding that courts have not extended such a covenant to commercial leases between two sophisticated parties who are not otherwise bound by any special element of reliance or fiduciary duties, we affirm the directed verdict dismissing appellant's claim for tor-

tious breach of an implied duty of good faith and fair dealing."

The Court's opinion thereafter points out that the lease which is the subject matter of this litigation contained an "at will" termination clause in favor of the Lessor, which clause was the subject negotiations for ten (10) years between the Respondents and the Appellant, who is an experienced business person and an attorney at law. Indicating that it did not find in this case "the special element of reliance" which prompted the Court in *United States v. Peterson,* 91 Nev. 617, 540 P.2d 1070 (1975) to recognize a cause of action in tort for breach of an implied covenant of good faith and fair dealing, this Court held that no such cause of action would lie in favor of Appellant herein.

It is respectfully submitted that this holding misperceives and misapprehends the nature of the covenant of good faith and fair dealing, and the public policy and purpose it is intended to serve, and the result is the imposition of substantial injustice upon Appellant.

The implied covenant of good faith and fair dealing is a duty imposed by law which arises out of a contractual relationship between the parties. As the California Supreme Court noted in *Tameny v. Atlantic Richfield Co.,* 27 Cal.3d 167, 164 Cal.Rptr. 839, a breach of a promise in a contract gives rise to an action *ex contractu,* whereas the breach of a legal duty which arises because of the contract relationship gives rise to an action *ex delicto.* The implied covenant of good faith and fair dealing gives rise to a legal duty, and therefore the breach thereof is a tort, notwithstanding that the relationship which creates that duty arises from a contractual relationship. This was precisely the

holding of this Court in *United States Fidelity v. Peterson*, supra, citing with approval *Silberg v. California Life Insurance Co.*, 521 P.2d 1103, 1108 (Cal. 1974); *Gruenberg v. Aetna Insurance Co.*, 510 P.2d 1032, 1036 (Cal. 1975) and *Communale v. Traders & General Insurance Co.*, 328 P.2d 198 (Cal. 1958).

The suggestion in this Court's opinion that such legal duty extends only to unsophisticated, unknowledgable and dependent persons, and that the protection thereof should be withheld from sophisticated business people and attorneys not bound by a special element of reliance is inconsistent with the stated public policy of this State and the purpose of the legal duty in the first instance. The Legislature, in the Uniform Commercial Code, has recognized that sophisticated, knowledgable business people, with experience and skill in commercial transactions, should be bound to and entitled to rely upon the legal duty of good faith and fair dealing. N.R.S. 104.2104 defines "merchants" as having such qualities of knowledge, experience and skill. N.R.S. 104.1203 provides:

> "Every contract or duty within this chapter (the entire Uniform Commercial Code) imposes an obligation of good faith in its performance or enforcement."

The Legislature defines "good faith" in N.R.S. 104.1201(19) as "honesty in fact in the conduct or transaction concerned", and then provides that sophisticated, knowledgable and experienced business people as well as others may not bargain away the obligation of "good faith". (N.R.S. 104.1102(3). The Legislature has further provided that when one of the parties to a transaction has a right which is exercisable "at will", such right shall be construed

to mean that he has the power to do so "only if he in good faith believes" its exercise is appropriate under the circumstances. Thus, under the Nevada statutory law, every contract or transaction between persons, whether sophisticated, knowledgable and experienced, or not, which involves the sale of goods, (N.R.S. 104.2101 et seq.) commercial paper, (N.R.S. 104.3101 et seq.) bank deposits and collections, (N.R.S. 104.4101 et seq.) letters of credit, (N.R.S. 104.5101 et seq.) bulk transfers (N.R.S. 104.6101 et seq.) warehouse receipts, bills of lading and documents of title (N.R.S. 104.7101 et seq.) investment securities (N.R.S. 104.8101 et seq.) and secured transactions (N.R.S. 104.9101 et seq.) gives rise to the breach of a legal duty of good faith and fair dealing. Even leases which are deemed to be security devices would give rise to such a duty. (*Cf. U.C. Leasing, Inc. v. Laughlin*, 96 Nev. 157, 606 P.2d 167 (1980) which holds such leases to be subject to the Uniform Commercial Code). The effect of the decision in the case at bar is to withhold the protection of such law only from commercial leases and transactions involving real property which are not otherwise subject to the provisions of the Uniform Commercial Code. Ironically if the Appellant had accepted the Respondents' offer to acquire her inventory upon her being required to vacate the premises, such transaction would have been subject to the covenant of good faith and fair dealing, notwithstanding the experience and knowledge of the Appellant, since it would have been governed by N.R.S. 104.6101 et seq. as a "bulk transfer".

The resulting anomaly cannot be justified by reason or logic, particularly on the premise stated in this Court's opinion, that the business sophistication and experience of

the Appellant disentitles her in some way to the protection of the law applicable to all other contracts. It is precisely because she was a knowledgable and experienced business person and attorney that she acted in reliance on the implied covenant of good faith and fair dealing. It is clear from the record that despite her experience as a business person and the fact she is an attorney that she was not in an equal arms-length bargaining position with Respondents at the time of the renewal of the lease in 1978. She was in the position of trying to save a business which had been built by herself and her deceased husband over many years, and with building blocks comprised of an immeasurable amount of personal time, effort, money, toil and emotion. She objected strenuously to the "at will" termination clause, but the Respondents, because of their business strength, were in a position to tell her to "take it or leave it". Because she was a good business person and a knowledgable attorney, she was aware that under the law of this State there was an implied covenant of good faith and fair dealing in every contract, the breach of which would be a tort for which she would have a remedy in damages, pursuant to this Court's decision in *United States Fidelity v. Peterson, supra.* Because she was a merchant, she was familiar with the provisions of the Uniform Commercial Code pertaining to "good faith" and had no reason to believe, in the light of the *Peterson* decision, that she could not rely on the similar duty recognized in *Peterson* as applicable to *every* contract. She thus protected herself as far as she could against an abuse of power created by the "at will" termination clause by obtaining assurances from the Respondent that such power would only be exercised under specific described situations, i.e. if Appellant

were a bad tenant or if the space became usable for unlimited gaming. In reliance on these assurances she renewed the lease with the "at will" termination clause, and agreed to a percentage lease which gave Harrah's access to her previously carefully guarded gross sales information. To hold now that she was not entitled to rely upon the Respondents' obligation to be "honest in fact" results in an unfair and unjust deprivation of the protection of the law to which the Appellant had every right to believe she was entitled.

B. REHEARING SHOULD BE GRANTED TO PREVENT AN UNCONSTITUTIONAL DEPRIVATION OF THE EQUAL PROTECTION OF THE LAW AND OF DUE PROCESS OF LAW

As noted above, the net effect of this Court's decision in the case at bar is to hold that the implied covenant of good faith and fair dealing, and the tort remedy for the enforcement thereof, is available to those persons who purchase insurance contracts, enter into franchise agreements or otherwise contract for fiduciary obligations, or who engage in commercial and business transactions not involving leases or transfers of real property. All such persons will be entitled to rely upon the "honesty in fact" of the persons and entities with whom they deal; only transactions not within the Uniform Commercial Code or involving insurance or similar contracts will be left without a right to the performance of the implied covenant of good faith and fair dealing. It is respectfully submitted that this classification is arbitrary and unjustifiable. The same day this case was decided, this Court decided *State Farm Fire and Casualty Company v. All Electric, Inc.*, No. 13228, Nev. Adv. Op. No. 49 (3/31/83) in which it held that

a legislative discrimination between classifications of allegedly responsible persons was a violation of the Equal Protection Clause of the Nevada Constitution as well as the federal Constitution. In that case, the Court considered the effect of N.R.S. 11.205 which immunized contractors and architects from liability for design and construction defects after six (6) years but left owners and material suppliers liable. In holding such statute unconstitutional, this Court said:

> "Legislative classifications must apply uniformly to all who are similarly situated, and the distinctions which separate those who are included within a classification from those who are not must be reasonable, not arbitrary . . ."

It is respectfully submitted that the singling out of commercial tenants to exclude them from the protection of the legal duty arising from the implied covenant of good faith and fair dealing, while leaving all other sophisticated, knowledgable and experienced business people subject to such legal duty, is no more reasonable nor justifiable than the singling out of architects and contractors for protection while leaving owners and suppliers liable. To deny to the Appellant the protection of the law which is extended to virtually everyone else similarly situated is an unconstitutional denial of the equal protection of the laws, in violation of both the Federal Constitution, Amendment 14, and the State Constitution. The fact that this denial was accomplished judicially rather than legislatively does not affect the unconstitutionality of the result, since it is a denial of due process of law for a Court to accomplish indirectly what the Legislature is constitutionally precluded from accomplishing directly. (*Cf. Bouie v. City of Columbia,* 378 U.S. 347 (1964).

It is respectfully submitted that it was not the intention of this Court in the rendition of its decision herein to deny to the Appellant the protection of the law extended to virtually everyone else, but rather than such result was accomplished by the misapprehension of the scope of the implied covenant of good faith, and the fact that the stated public policy of this State already extended such obligation by legislation to commercial transactions between knowledgable and sophisticated businessmen. As a result the exclusion of the limited class of people to which Appellant belongs which is the class of people who enter into commercial contracts not governed by the Uniform Commercial Code, the insurance law, franchise law, the law of fiduciary duty or the law of employment becomes arbitrary and unreasonable. It is therefore submitted that rehearing should be granted to consider the effect of such limited exclusion in light of the remaider of Nevada statutory and case law pertaining to the implied covenant of good faith and fair dealing.

C. REHEARING SHOULD BE GRANTED TO ACCOMPLISH SUBSTANTIAL JUSTICE UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE.

As noted above, at the time the renewal of the lease herein involved was effected, the Appellant justifiably relied on the recognition of a cause of action to enforce in tort the implied obligation of good faith and fair dealing. It is axiomatic that contracts are entered into with reference to the controlling laws that affect them at the time they are entered into. (*Cf. Stevens v. First National Bank*, 65 Nev. 352, 196 P.2d 756 (1948)). Such laws enter into the

contract as fully as if specifically incorporated therein or referred to by the contract. Thus, the Appellant's contract containing an "at will" termination clause was, at the time it was entered into, modified by the requirement that the power created thereby be exercised in good faith and not abused. It is respectfully submitted that the issue presented herein was not whether the implied covenant of good faith should be *extended* to the type of contract herein involved; the broad language of the Peterson case and the cases on which it relied, as well as the public policy enunciated in the Uniform Commercial Code clearly indicated that such duty extended to *every* contract. The issue is whether such duty should be withdrawn from contracts to which it otherwise apparently applied. It is submitted that the withdrawal of such duty from contracts involving commercial leases effects a substantial injustice, particularly to a contracting party who, because of her experience, skill, knowledge and professional expertise, had every reason to rely upon such protection from an odious termination clause which she did not have the power to bargain away.

In *Seaman's Direct Buying Service, Inc. v. Standard Oil of California, Inc.*, 181 Cal.Rptr. 126 (Cal.App. 1982), the Court also suggested that there was an "unwillingness on the part of the Supreme Court to expand the law allowing recovery in tort", and therefore did not allow such recovery. The California Supreme Court has granted a hearing on that case, presumably to clarify for the State of California the scope of the remedy in tort for breach of an implied covenant of good faith and fair dealing. Inasmuch as Nevada's adoption of a tort remedy for breach of such covenant was adopted from the California judicial decisions which recognized such cause of action and remedy in the

first instance, (*United States Fidelity v. Peterson, supra,* and cases therein cited) it is respectfully suggested that the decision to be rendered in *Seaman's* may prove instructive and helpful on the issue which is presented herein, and that rehearing should be granted so that the California determination in Seaman's can be reviewed and considered in ruling upon the merits of the issues herein presented by this petition.

In summary, it is respectfully submitted that rehearing should be granted to correct the substantial injustice which has resulted by reason of the Appellant's having been deprived of a right and remedy which she relied upon in entering into the lease renewal with the Respondent. In addition, rehearing should be granted to remedy the apparent unconstitutional denial of equal protection of the laws and due process of law which has resulted from the effect of such Decision, which denies to a limited class of people the protection of the law imposing a duty of good faith and fair dealing upon all persons who enter into contractual relationships with others.

CONCLUSION

WHEREFORE, Appellant prays that this Petition for Rehearing be granted.

DATED this 14th day of April, 1983.

Respectfully submitted

/s/ Nicholas J. Drakulich
and
/s/ Nada Novakovich
Attorneys for Appellant

Appendix C

In the Supreme Court of the State of Nevada
No. 13533

Nada Novakovich Aluevich,
Appellant,

vs.

Harrah's or Harrah's Club, a Nevada Corporation; L. Mead Dixon, Lloyd Dyer; Romano Andreotti; Maurice Sheppard; Bob Contois and George Poore,
Respondents.

[Filed July 29, 1983]

Order Denying Rehearing

Rehearing denied. NRAP 40(c).

It is so ORDERED.

/s/ Manoukian, C.J.
/s/ Springer, J.
/s/ Mowbray, J.
/s/ Steffen, J.
/s/ Zenoff, Sr. J.[1]

cc: Nada Novakovich
Nicholas J. Drakulich
Vargas & Bartlett
Alfred F. Pagni

[1]The Honorable David Zenoff, Senior Justice, was assigned to participate in this case by the Chief Justice, pursuant to Nev. Const. Art. 6, § 19.

Appendix D

In the Supreme Court of the State of Nevada

Clerk's Certificate

State of Nevada, ss.

I, C. R. Davenport, the duly appointed and qualified Clerk of the Supreme Court of said State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in the matter of Aluevich v. Harrah's, et al., No. 13533.

Judgment

The Court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, to the effect: ". . . affirmed."

Judgment, as quoted above, entered this 31st day of March, 1983.

Judgment

The Court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, to the effect" "Rehearing denied."

Judgment, as quoted above, entered this 29th day of July, 1983.

In witness whereof, I have hereunto set my hand and affixed the seal of said Supreme Court, at my office in Carson City, Nevada, this 8th day of August, 1983.

C. R. Davenport
Clerk of Supreme Court
of the State of Nevada

By Judith Fountain
Deputy

Office-Supreme Court, U.S.
FILED
DEC 23 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-691

In The

Supreme Court of the United States

October Term, 1983

NADA NOVAKOVICH ALUEVICH,

Petitioner,

vs.

HARRAH'S, a Nevada corporation; HARRAH'S CLUB, a Nevada corporation; HOLIDAY INNS, INC., a Tennessee corporation; L. MEAD DIXON; LLOYD DYER; ROMANO ANDREOTTI; MAURICE SHEPPARD; BOB CONTOIS; GEORGE POORE; ARTHUR SMITH,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the United States Supreme Court have jurisdiction to grant a Petition for a Writ of Certiorari to the Nevada Supreme Court when the Fourteenth Amendment questions raised in the Petition were not addressed or considered by the state court, and where the petitioner raised the constitutional questions for the first time in a Petition for Rehearing of the state court's decision?

2. Does the decision of the Nevada Supreme Court, that petitioner failed to establish the requisite special element of reliance or fiduciary duty necessary to a cause of action for breach of an implied covenant of good faith and fair dealing, present a sufficiently substantial and important federal question to warrant granting a Petition for a Writ of Certiorari?

LIST OF PARTIES

Respondents herein, with the exception of Arthur Smith,[1] were the respondents in the Supreme Court of Nevada.

Harrah's, a Nevada corporation, is presently a wholly owned subsidiary of Holiday Inns, Inc., a Tennessee corporation. Harrah's Club, a Nevada corporation, is presently 85.12% owned by Holiday Inns, Inc. and 14.88% owned by Harrah's.

The listing of all parent companies, subsidiaries, and affiliates of HARRAH's, a Nevada corporation, HARRAH's CLUB, a Nevada corporation, and HOLIDAY INNS, INC., a Tennessee corporation, is included herein as Appendix A, as required by Supreme Court Rule 28.1.

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[1] Arthur Smith was dismissed from the appeal to the Nevada Supreme Court due to lack of jurisdiction, and therefore was not a party to the decision.

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No. 83-691

In The

Supreme Court of the United States

October Term, 1983

NADA NOVAKOVICH ALUEVICH,

Petitioner,

vs.

HARRAH'S, a Nevada corporation; HARRAH'S CLUB, a Nevada corporation; HOLIDAY INNS, INC., a Tennessee corporation; L. MEAD DIXON; LLOYD DYER; ROMANO ANDREOTTI; MAURICE SHEPPARD; BOB CONTOIS; GEORGE POORE; ARTHUR SMITH,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

RESPONDENTS' BRIEF IN OPPOSITION

Respondents hereby submit this brief in opposition to the Petition for a Writ of Certiorari.

JURISDICTION

Respondents respectfully submit that the jurisdictional requirements of 28 U. S. C. § 1257(3) have not been satis-

fied by petitioner, and for that reason this Court should decline jurisdiction of this case.

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

Article 1, Section 15 of the Nevada Constitution

No . . . law impairing the obligation of contracts shall ever be passed.

28 U.S.C. § 1257(3)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Supreme Court Rule 17.1

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. . . .

Supreme Court Rule 21.1(h)

(h) If review of the judgment of a state court is sought, the statement of the case shall also specify

the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.

NRAP[2] *28(a)(2)*

(a) *Brief of the Appellant.* The brief of the appellant shall contain under appropriate headings and in the order here indicated:

. . .

(2) A statement of the issues presented for review.

NRAP 40(c)(1)

(c) *Scope of Application; When Rehearing Considered.*

(1) . . . no point may be raised for the first time on rehearing.

STATEMENT OF THE CASE

The Statement of The Case by petitioner is, for the most part, nothing more than a selective interpretation of her testimony at trial. In this regard, it must be noted

[2] "NRAP" is an abbreviation for the Nevada Rules of Appellate Procedure.

that petitioner alleged multiple claims for relief against respondents, including claims for fraud and interference with prospective business advantage. The latter two claims went to a jury, and a verdict was returned in favor of respondents. The Respondents' Statement of Case and Statement of Facts from their brief to the Nevada Supreme Court is included herein as Appendix B. This Statement contains ample citations to the record, to aid this Court's decision. *See Webb v. Webb*, 451 U. S. 493, 495 n. 2 (1981).

This case concerns the enforceability of an unqualified cancellation clause contained in a commercial sublease negotiated between sophisticated parties not bound by any special element of reliance or fiduciary duties.

HARRAH'S CLUB leased the Byington Building from the Byington Estate on December 30, 1958. HARRAH'S CLUB subleased a portion of the premises to petitioner and her late husband on January 16, 1968, for a five year term. The sublease contained the following clause:

> The Lessor shall have the option to cancel this Lease upon ninety (90) days' written notice to the Lessees.

The sublease provided that, in the event the option to cancel was exercised by HARRAH'S CLUB, HARRAH'S CLUB was to pay to petitioner the unamortized portion of any improvements she had made to the premises, based upon the number of months remaining under the lease.

On March 1, 1973, HARRAH'S CLUB relet the premises to petitioner for a period of five years, "unless sooner terminated as hereinafter provided." The language of this sublease was substantially similar to the previous lease, and the cancellation clause was identical, as quoted above.

On March 1, 1978, the 1973 sublease was renewed for a term of five (5) years, on the "same terms, conditions, covenants, and agreements" as the 1973 sublease, with some modifications concerning rent, improvements, and renewal. See Appendix B. During negotiations deletion of the cancellation clause was discussed; the cancellation clause remained intact. HARRAH'S CLUB had a policy requiring a cancellation clause in all of its leases.

On October 2, 1978, pursuant to the termination privilege contained in the 1978 sublease, HARRAH'S CLUB served notice on petitioner of its intention to cancel the sublease. The effective date of cancellation was January 1, 1979, but HARRAH'S CLUB granted an extension until February 28, 1979. Petitioner vacated the premises on that date. Following the cancellation, petitioner filed a complaint alleging numerous claims for relief.

The alleged claim for relief which is the focus of the instant petition is for tortious breach of an implied covenant of good faith and fair dealing. Application of such a covenant under the circumstances of the case was thoroughly argued and briefed *prior* to trial.[3] Petitioner made no suggestion that her lawsuit had potential constitutional ramifications.

The case went to trial, and after the evidence had been presented, the trial court held that no genuine issue as to any material fact existed regarding what it referred

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[3] The pleadings filed with respect to the implication of a covenant of good faith in the sublease were voluminous, and appear in the Record on Appeal ("ROA") at the following pages: ROA Vol. II, 364-457; ROA Vol. II, 524-620; ROA Vol. III, 629-646; ROA Vol. III, 701-750.

to as the "bad faith" claim, and thus granted a directed verdict as to this claim in respondents' favor, pursuant to Rule 50(a) of the Nevada Rules of Civil Procedure.

Petitioner appealed the directed verdict to the Nevada Supreme Court. Petitioner argued that the covenant of good faith and fair dealing should be implied in her sublease with HARRAH'S CLUB. Respondents argued that the cancellation clause was clear, unqualified and unambiguous, and should be enforced as written. At no point in either her opening brief or reply brief to the Nevada Supreme Court did petitioner suggest the existence of any potential constitutional questions or ramifications in the case.

The Nevada Supreme Court held in favor of respondents.

> In the present case, the appellant is an experienced business person and an attorney. The unqualified termination privilege was the subject of negotiations for ten years. Although the cancellation privilege remained unqualified, appellant continued to renew the subleases. The relationship between appellant and respondent was that of lessee and lessor. We do not find, in the present case, the special element of reliance which [has earlier prompted this court] to recognize a cause of action in tort for the breach of an implied covenant of good faith and fair dealing.

Aluevich v. Harrah's, 99 Nev. 215, 218, 660 P. 2d 986, 987 (1983).

Petitioner subsequently filed a Petition for Rehearing in the Nevada Supreme Court on April 15, 1983, claiming in the petition for the *first time* that an unwillingness to recognize a cause of action under the circumstances of

her case constituted a denial of equal protection of the laws under the Fourteenth Amendment.

The Nevada Supreme Court denied the Petition for Rehearing without opinion, citing NRAP 40(c) which provides in part that "no point may be raised for the first time on rehearing."

STAGE AT WHICH THE FEDERAL QUESTIONS WERE RAISED

As detailed in Respondents' Statement of the Case, and the argument which follows, petitioner did nothing to specially set up or claim her alleged federal constitutional rights until the Petition for Rehearing to the Nevada Supreme Court.

Contrary to the assertion in the petition, the Petition for Rehearing did not challenge the Nevada Supreme Court's decision by reason of any violation of Article I, Section 10 of the United States Constitution. That constitutional provision was not cited, nor were any rights claimed under the Nevada Constitution, Article 1, § 15. *See Webb v. Webb,* 451 U. S. at 496-498; *Bowe v. Scott,* 233 U. S. 658, 665 (1914).

ARGUMENT

I.

The Supreme Court does not have jurisdiction to review a state court decision when the state court never addressed or considered the purported federal questions, and where the federal questions were raised by the petitioner for the first time in a petition for rehearing of the state court's decision.

It is a long-settled rule that the jurisdiction of the United States Supreme Court to reexamine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. *Webb v. Webb,* 451 U. S. at 496. Because this case presents a petition for a writ of certiorari to a state court, the relevant jurisdictional statute is 28 U. S. C. § 1257. As applied to the circumstances of this case, that statute requires that in the state courts petitioner has "specially set up or claimed under the constitution . . . of . . . the United States" those rights which she now seeks to have this Court enforce. 28 U. S. C. § 1257(3). *Webb v. Webb,* 451 U. S. at 495.

Supreme Court Rule 21.1(h) requires a petitioner to "specify the stage in the proceedings, both in the court of the first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; *the method or manner of raising them* and the way in which they were passed upon by the court." (Emphasis added.)

Petitioner's jurisdictional statement asserts that the federal questions in this case were first "raised" when the trial court "withdrew" the issue concerning application of the implied covenant of good faith and fair dealing from the jury. Petitioner misconceives the jurisdictional requirement that federal questions be specifically set up or claimed. It was incumbent upon petitioner to affirmatively argue the possible constitutional ramifications of the case as soon as the purported federal questions arose. In other words, at all stages when the question as to application of the covenant of good faith and fair dealing was in issue, petitioner was required to inform the court of the purported federal questions she now seeks to raise.

As the record in this case shows, application of the covenant of good faith and fair dealing was indeed argued at nearly every stage of the proceeding. With the exception of this petition and the Petition for Rehearing of the Nevada Supreme Court's decision, petitioner never so much as mentioned that her lawsuit had potential federal constitutional ramifications.[4]

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[4] Application of the covenant of good faith and fair dealing under the facts of the case was thoroughly argued and briefed during the following stages of the proceeding without a single mention of a purported federal question by petitioner:

1. Prior to trial, see note 3, *supra*.
2. Motion for Directed Verdict. See ROA Vol. IX, 968-1002.
3. Petitioner's Opening Brief to Nevada Supreme Court.
4. Petitioner's Reply Brief to Nevada Supreme Court.
5. Oral Argument to Nevada Supreme Court.

In deciding whether a federal question has been "specifically set up or claimed" within the meaning of 28 U. S. C. § 1257(3), it is relevant and usually sufficient to ask whether the petitioner satisfied the state rules governing presentation of the issues. *See, e.g., Beck v. Washington,* 369 U. S. 541, 549-554 (1962), *Food Employees v. Valley Plaza,* 391 U. S. 308, 334-335 (1968) (Harlan, J., dissenting).

As is manifest from the opinions rendered by the members of the Nevada Supreme Court, the state court never considered the case to have potential constitutional ramifications. This Court has frequently stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts unless the aggrieved party in this Court can *affirmatively* show the contrary." (Emphasis added.) *Webb v. Webb,* 451 U. S. at 495, quoting *Street v. New York,* 394 U. S. 576, 582 (1969). Failure to present the federal question in conformance with state procedure constitutes adequate and independent grounds of decision barring review in the United States Supreme Court, so long as the state has a legitimate innterest in enforcing its procedural rules. *Michigan v. Tyler,* 436 U. S. 499, 512, n. 7 (1978); *Stembridge v. Georgia,* 343 U. S. 541, 547 (1952).

It is clear in this case that petitioner has failed to follow well-established procedural requirements in presenting her purported federal questions to the Nevada Supreme Court. Federal questions which the highest state court is, by its settled practice, justified in disregarding, either because not assigned or because not noticed or relied upon in the brief or argument of counsel, will not

serve as the basis of a writ of error from the federal Supreme Court. *Beck v. Washington, supra*; *Hulbert v. Chicago,* 202 U. S. 275, 281 (1906).

As discussed above, petitioner never mentioned that this case had potential federal constitutional ramifications until her Petition for Rehearing to the Nevada Supreme Court. A constitutional issue not raised to or passed upon by the trial court will seldom be considered by the Nevada Supreme Court on appeal. *Munoz v. State, ex rel. Dep't. of Hwys.,* 92 Nev. 441, 444, 552 P. 2d 42, 43-44 (1976), citing *Tennessee v. Dunlap,* 426 U. S. 312 (1976).

Rule 28(a) (2) of the Nevada Rules of Appellate Procedure required petitioner to set forth in her opening brief a statement of the issues presented for review.[5] Unless there has been clear error, the Nevada Supreme Court will not consider questions which have not been raised in the briefs or in oral argument. *Wittenberg v. Wittenberg,* 56 Nev. 42, 455-456, 55 P. 2d 619, 624 (1936); *Walker v. Burkham,* 67 Nev. 541, 577, 222 P. 2d 205, 223 (1950).

Moreover, it is established beyond doubt in Nevada that "no point may be raised for the first time on rehearing." NRAP 40(c) (1). *Powell v. N. C. & O. Ry,* 28 Nev. 305, 82 P. 96 (1905); *State v. Ceja,* 53 Nev. 281, 2 P. 2d 124 (1931); *In re Lorring,* 75 Nev. 330, 335, 340 P. 2d 589 (1959). This Court has recognized the reasonability of Nevada procedural rules in the past. *N.-C.-O.*

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[5] A copy of the issues presented for review in petitioner's opening brief to the Nevada Supreme Court is included herein as Appendix C. No constitutional issue was raised.

Ry. v. Burris, 38 Nev. 156, 145 P. 926 (1914), *aff'd*, 244 U. S. 103 (1917). (Refusal of trial court to allow leave to amend answer at trial in order to assert a federal question).

It has likewise been repeatedly emphasized by this Court it is too late to raise a federal question for the first time in a petition for rehearing, after the final judgment of the state court of last resort.

> [I]t is elementary that a mere assertion in a state court or a right under the Constitution of the United States in a petition for rehearing affords no ground for invoking the jurisdiction of this court unless the court below in dealing with the petition for rehearing considers and passes on the federal ground therein relied upon. . . .

Bowe v. Scott, 233 U. S. 658, 663 (1914); *see also Radio Station WOW v. Johnson*, 326 U. S. 120, 128 (1945).

The Nevada Supreme Court denied the Petition for Rehearing using the following language: "Rehearing denied. NRAP 40(c). It is so ORDERED." The citation to NRAP 40(c) (quoted in part above) indicates that the Petition was denied on procedural grounds. A cursory denial of a petition for rehearing does not constitute a decision on the merits as to the federal questions raised in the petition. *Consol. Turnpike Co. v. Norfolk & O. V. Ry. Co.*, 228 U. S. 326, 333-334 (1913); *Forbes v. State Council of Viriginia*, 216 U. S. 396, 398-399 (1910).

Petitioner cannot claim that she was surprised by the Nevada Supreme Court's decision, as the trial court decided the issue regarding application of the covenant of good faith and fair dealing in exactly the same manner.

The law in Nevada concerning the implied covenant of good faith and fair dealing is not well developed and any reliance by the petitioner on the Nevada Supreme Court extending application of the covenant to her case under the particular circumstances was unreasonable.

> There is no constitutional right to have all general propositions of law once adopted remain unchanged. . . . that the supreme court of Colorado departed from earlier and well-established precedents to meet the exigencies of this case, whatever might be though of the justice or wisdom of such a step, the Constitution of the United States is not infringed. . . . in general, the decision of a court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the 14th Amendment merely because it is wrong or because earlier decisions are reversed.

Patterson v. Colorado, 205 U.S. 454, 461 (1907).

The jurisdictional requirement that federal constitutional issues must be presented to and decided by the highest state court is not formal, but is rather grounded upon policy.

> [T]here are powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts. These considerations strongly indicate that we should apply this general principle with sufficient rigor to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below.

Webb v. Webb, 451 U.S. at 499. These policy considerations include comity, development of the record, identification of adequate and independent state grounds, and judicial economy. *Id.* at 499-501. These considerations indicate that the instant petition must be denied for lack of jurisdiction.

II.

The constitutional questions raised by the petitioner are not sufficiently substantial or important to warrant certiorari.

"A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore." Supreme Court Rule 17.1.

An important factor to consider is the presence of conflicting decisions on the federal questions asserted. *Id.* In this case, there is no conflict in authority and respondents are aware of no case, state or federal, which has decided any of the novel federal questions raised in the petition. *Cf. Trimble v. Seattle,* 231 U. S. 683 (1914).

Aside from a bare desire to have this Court consider her purported federal constitutional claims, petitioner only mentions two reasons:

1. "To clarify the confusion which has occurred among the states . . . as a result of the dismissal of the appeal in *Carter v. Hartenstein,* 401 U. S. 901 (1971)"; and

2. "[T]o review the decision of the Nevada Supreme Court to correct this obvious and unwarranted injustice."

Neither of these reasons is sufficiently "special and important" to warrant review.

A decision in this case would not function to clarify any confusion among the states as a result of the dismissal of the appeal in *Carter v. Hartenstein, supra.* As

petitioner notes in her brief, the confusion caused by *Carter* was due to this Court's dismissal of that appeal for lack of a substantial federal question. However, the confusion in the state courts does not relate to any federal constitutional issue, but rather concerns the precedential value of the dismissal, i.e., limited precedential value *vis a vis* a binding adjudication on the merits.

Granting the instant petition could not alleviate the confusion asserted by petitioner. This case comes before this Court on a petition for a writ of certiorari, not on an appeal. Moreover, as is apparent, the facts of the two cases are entirely different. The constitutional issues addressed in *Carter* involved the rationality of a statutory provision limiting liability for design and construction defects to a period of six years after completion of construction. The instant case involves the enforcement of an unambiguous cancellation clause in a commercial sublease between sophisticated parties, and the application of the implied covenant of good faith and fair dealing.

The application of an implied covenant in a lease agreement does not present a substantial or important federal question. *See Trimble v. Seattle,* 231 U. S. 683 (1914). The construction of a local contract under local law does not present a substantial federal question. *Black v. Cutter Laboratories,* 351 U. S. 292 (1956). This Court is reluctant, in the name of the Fourteenth Amendment, to substitute its judgment for that of a state court in a matter concerning local policy, especially with regard to a specific judicial determination in a specific case. *Drivers Union v. Meadowmoor Co.,* 312 U. S. 287, 294 (1941).

The other reason for this Court to grant review asserted by petitioner is "to correct this obvious and unwarranted injuistice." However, petitioner misapprehends the function of this Court. Review by certiorari is discretionary, and depends upon numerous factors other than the perceived correctness of the judgment below. *See United States v. Shannon*, 342 U. S. 288, 294-297 (Frankfurter, J., dissenting).

State courts have supreme power to interpret written and unwritten laws of the state. That a state court has rendered an allegedly erroneous decision on a question of state law, or overruled principles established by previous decisions on which a party has relied, does not confer jurisdiction on the United States Court. *Patterson v. Colorado*, 205 U. S. at 460-461; *Agins v. Tiburon*, 447 U. S. 255, 259, n. 6 (1980). Except in exceptional circumstances, the United States Supreme Court must accept as controlling decisions of the state courts on questions of local law, both statutory and common. *Amer. Ry. Exp. Co. v. Kentucky*, 273 U. S. 269, 272-273 (1927); *see also Reynolds v. Georgia*, 640 F. 2d 702 (5th Cir. 1981).

Whether the evidence presented in a case is sufficient to make out a state cause of action is a question of state law. *Amer. Radio Ass'n. v. Mobile S. S. Ass'n.*, 419 U. S. 215, 231-232 (1974); *see also California Liquor Dealers v. Midcal Aluminum*, 445 U. S. 97, 111-112 (1980). Petitioner has not raised a substantial or important federal question, but instead asks this court to review a question concerning an emerging state cause of action.

In addition, the federal questions asserted must be sufficiently meritorious to warrant consideration. *Equitable Life Assurance Soc'y v. Brown*, 187 U. S. 308, 311

(1902). *Zucht v. King,* 260 U. S. 174 (1922). Where the purported constitutional issues come to this Court in highly abstract form, as opposed to clean-cut and concrete, and without the benefit of refinement of the state law involved, this Court should not exercise jurisdiction. *Rescue Army v. Municipal Court,* 331 U. S. 549 (1947); *see also Wainwright v. City of New Orleans,* 392 U. S. 598 (1968) (Harlan, J., concurring).

Even if this Court were to decide the federal questions asserted by petitioner, the judgment of the Nevada Supreme Court would be unaffected. As to petitioner's purported claim for an unconstitutional impairment of contract, not only was this issue *never* raised in the state court proceedings, this contention is wholly without merit. Petitioner claims that her sublease agreement with Harrah's Club was impaired by the decision of the Nevada Supreme Court. However, this Court has stated that Article I, Section 10 of the United States Constitution does not apply to *judicial* impairment of a contract, as opposed to legislative impairment. It is well established that impairment by judicial decision does not raise a federal question. *Tidal Oil Co. v. Flanagan,* 263 U. S. 444, 451, n. 1 (1924); *see also Allied Structural Steel Co. v. Spannaus,* 438 U. S. 234, 257 (1978) (Brennen, J., dissenting).

Petitioner also claims that the decision of the Nevada Supreme Court denies her equal protection of the laws. However, it is clear that the decision was simply an application of state law to the particular facts of the case. There was no classification by the court; the decision merely affects petitioner's situation.

However, assuming the existence of a discrete class and an equal protection issue for argument's sake, there was no violation of the Fourteenth Amendment. Petitioner admits there is no fundamental issue at stake, and that any judicial classification need only be rational. "The role of the court is to determine whether the classification bears a rational relationship to the legislative purpose sought to be effected." Petitioner's Brief at p. 12, citing *Dandridge v. Williams,* 397 U. S. 471 (1970).

The legitimate purpose served by the Nevada Supreme Court's decision is manifest: certainty in commercial transactions. The effect of the decision is simply to bind petitioner to the express terms of the sublease agreement. This Court should require no citation of authority to support the proposition that certainty in commercial transactions is a legitimate purpose to be affected by classification.

Any distinction created between sophisticated commercial lessees and other contracting parties is completely rational. A sophisticated business person and attorney is simply not similarly situated with an unsophisticated contracting party with limited legal experience. Any such distinction recognizes that the element of reliance is a proper focus for the implication of a covenant of good faith and fair dealing in an otherwise unambiguous document. Indeed, it was this element of reliance which initially motivated some courts to recognize a cause of action based upon the implied covenant of good faith and fair dealing.

The Nevada Supreme Court also noted other reasons for its decision, which establish that petitioner is not similarly situated with other contracting parties. The can-

cellation clause at issue was unambiguous, and the subject of negotiations over a ten year period. Petitioner is not similarly situated with a party to an adhesion contract, such as a contract for insurance. The relationship between petitioner and Harrah's was that of sublessor/sublessee. It is rational to distinguish between this relationship and an ordinary sales contract, as a sublessor may require continuing control over the occupancy of the premises, unencumbered by an implied covenant contradicting the express terms of the sublease.

Petitioner stresses that "merchants" are entitled to the benefits of an implied covenant of good faith and fair dealing under the provisions of the Uniform Commercial Code. (Nev. Rev. Stat. Chapter 104). Of course, the Uniform Commercial Code does not apply to agreements concerning real property. If petitioner's analogy is to have merit, it must mean that she is arguing for an extension of the provisions of the Uniform Commercial Code to all contracts as a matter of federal constitutional law. If petitioner is correct in her assertion, that is arbitrary to treat commercial lessees differently than merchants of goods, would it not also be arbitrary to apply the provisions of the Uniform Commercial Code to sales contracts, while not applying them to service contracts? It is doubtful that the drafters of the Uniform Commercial Code, or of the Fourteenth Amendment, ever envisioned this area of contract law expanding into the realm of federal constitutional law.

Under the familiar "rational basis" test, this court will not attempt to decide on the wisdom and utility of the purported arbitrary classification, and it is clear that states need not "strike at all evils at the same time or

in the same way." *Minnesota v. Clover Leaf Creamery Co.*, 449 U. S. 456 (1981). Thus, the Nevada Supreme Court must remain free to decide each case on an individual basis, and to deal with the emerging doctrine of the implied covenant of good faith and fair dealing one step at a time.

For the foregoing reasons, it is respectfully submitted that the federal constitutional questions presented in the petition are not sufficiently important or substantial to warrant granting the Writ of Certiorari.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED this 22nd day of December, 1983.

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APPENDIX A

Respondents' List of Parent, Subsidiary And Affiliated Corporations

Name

ADM, Inc.
Aerohotel, S. A.
Cambridge Hills Investment Company
Chicago Mart Plaza H.I., Inc.
Civic Center Development Corporation
Cove Lake Investment Company
Cumberland Investment Company
Delta Hotels Limited
Develco, Inc.
Dixie Realty, Inc.
Downtown Trenton Corporation
Eastland Catering Company
80 Operating Co., Inc.
Gateway Motels Corp.
General Data Corporation
General Innkeeping Acceptance Corporation
GIAC Leasing Corporation
Great Northern Realty, Inc.
Great Western Investment Co.
Griffin Gate Catering Company
Harrah's
Harrah's Atlantic City, A New Jersey Corporation
Harrah's Club
AIR Corporation
Harrah South Shore Corp.
Harrah's Middle Fork Charters, Inc.
Harrah's PTY Limited
Middle Fork Lodge, Inc.
The Palace Corporation
Harrah's-Holiday Inns, Inc.
Harrah's-Holiday Inns of New Jersey, Inc.
Harrah's New Jersey, Inc.
Harrah's Boardwalk, Inc.
Harrah's Service, Inc.

H.I. (Canada), Inc.
HI-Communications, Inc.
HI Chat-Lem, Inc.
H.I. Holdings, Inc.
H.I. (Ireland) Limited
HI JV 77750, Inc.
HI-NET Communications, Inc.
HIOA, Inc.
HI-Air, Inc.
H, M & G, Inc.
Holiday Clubs International, Inc.
Holiday Edwardsville Holding Co.
  Holiday South Lindbergh, Inc.
Holiday Inn-Caribbean, Inc.
Holiday Inn JV 67650, Inc.
Holiday Inn Mexicana S.A.
  Hipocampo, S.A.
Holiday Inn of Israel (1977) Ltd.
Holiday Inns (Andina), Inc.
  Hotelera Holiday Inns (Andina) Limitada
Holiday Inns Aruba N. V.

Holiday Inns Australia Pty Limited
Holiday Inns (The Bahamas), Inc.
Holiday Inns (Bahrain), Inc.
Holiday Inns (Belgium), Inc.
Holiday Inns (Bolivia), Inc.
Holiday Inns (Colombia), Inc.
Holiday Inns Continental, Inc.
Holiday Inns (Costa Rica), Inc.
Holiday Inns de Espana, S.A.
Holiday Inns (Egypt), Inc.
Holiday Inns (Far East Ltd.), Inc.
Holiday Inns Finance N. V.

Holiday Inns (France), Inc.
Holiday Inns (France) et Cie S.N.C.
Holiday Inns (Germany), Inc.
  Continental Motor Inns (Deutschland)

DUPA Hotelbetriebs-und Beratungsgesellschaft MbH
Holiday Inns von Deutschland GmbH
MAH Hotelbetriebs-und Beratungsgessellschaft MbH
Holiday Inns (Hong Kong), Inc.
Holiday Inns Hotels do Brasil Limitada
Holiday Inns do Brasil Participacoes e Gerenciamento de Hoteis Ltda.
Capital Center Hoteis S.A.
Holiday Inns (Indonesia), Inc.
Holiday Inns (Italy), Inc.
Holiday Inns (Jamaica), Inc.
Holiday Inns (Jeddah S.A.), Inc.
Holiday Inns (Jordan), Inc.
Holiday Inns (Kuwait), Inc.
Holiday Inns (Lebanon), Inc.
Holiday Inns Limited
Holiday Inns (Malaysia) Sdn Bhd
Holiday Inns (Middle East), Inc.
Holiday Inns (Netherland) N.V.
Holiday Inns (The Netherlands), Inc.
Netherlands International Hotels B.V.
Holiday Inns (Oman), Inc.
Holiday Inns (Paraguay), Inc.
Holiday Inns (Peru), Inc.
Holiday Inns (Peru) Management, Inc.
Holiday Inns (Philippines), Inc.
Holiday Inns (Saudi Arabia), Inc.
Holiday Inns (Sharjah), Inc.
Holiday Inns (Singapore), Inc.
Holiday Inns (South America), Inc.
C. A. Holiday Inn—VIHSA
Complejo Turistico La Sapoara, C. A.
Holiday Inns (Spain), Inc.
Holiday Inns (Thailand), Inc.
Holiday Inns (U. K.), Inc.
Holiday Inns of America, Inc.
Holiday Inns of America (U. K.) Limited

Holiday Inns of Belgium N. V.
Ghenthotel N. V.
Holiday Inns of Massachusetts, Inc.
Holiday Inns of Monaco, Inc.
Holiday Inns of Nevada, Inc.
Nob Hill Casino, Inc.
River Boat Casino, Inc.
Holiday-Casino, Inc.
Holiday Inns of New Mexico, Inc.
Holiday Inns of Tel Aviv Ltd.
Holiday Inns of the Bahamas, Limited
Holiday-Marina, Inc.
Holiday Restaurant, Inc.
Holiday Woodcraft, Inc.
Hoteles Y Turismo H. I. H., S. r. l.
Howlett Enterprises, Inc.
Indian Valley Realty Corp.
Industrial General Agency (Tenn.), Inc.
American Commonwealth Assurance
Company Limited
Industrial Realty, Inc.
Inn Keepers Supply, S. A. de C. V.
Inn Operations, Inc.
Denver Motor Hotels, Inc.
Downtown Topeka Motor Hotels, Inc.
Dubuque Motor Hotels, Inc.
Duluth Motor Hotels, Inc.
Johnson County Motor Hotels, Inc.
Kansas Super Motels, Inc.
Minot Motor Hotels, Inc.
Salt Lake City Motor Hotels, Inc.
Investors Development Co., Inc.
Rubert Investment Co.
Jan-Jan, Inc.
Junker Realty Corp.
Kansas Super Motels of North Dakota, Inc.
Ken-Hills Investment Company
La Societe Developpement et Gestion
Hoteliere de Strasbourg, S. A. R. L.
MHI, Inc.

Marshall Motels, Inc.
Midtown Investment Company
Millcreek Investment Company
Milwaukee North, Holiday Inns, Inc.
Milwaukee South, Holiday Inns, Inc.
Motels Development Corporation
National Inns, Inc.
New South Furniture Exposition Corporation
Northeast DeSoto Utility Company
Northern Hills Realty, Inc.
Ohio Hills Investment Company
Olive Branch Corp.
Omega Hotels Limited
Park Hills Investment Co.
Perkins Restaurants, Inc.
Pipers Restaurants, Inc.
Porter Elco, Inc.
Queensgate Investment Co.
Rainbow Springs Corporation
Rich-Hills Operating Company
Riverfront Investment Co., Inc.
S. B. Liquidating, Inc.
Shadeland Development Corp.
Tak How Investment Limited
Tex-Ken, Inc.
The St. Louis Chair Company
Town Park Hotel Corporation
Two Two One One Market Street Operating Co.
2211 Market Street Redevelopment Corporation
Warren Hills Investment Company

Respondents' List of Affiliated Joint Ventures

HI-GBN
1355 N. Harbor Drive
San Diego, California 92101

Rainbow Springs Joint Venture
6600 Southwest 57th Ave., Suite 2
Miami, Florida 33143

Holiday-GSL Joint Venture
2045 Kalakaua Avenue
Honolulu, Hawaii 96815

Wolf Point Hotel Joint Venture
400 East Randolph St.
Chicago, Illinois 60601

Holiday Waikiki Venture
345 Queen Street, Suite 400
Honolulu, Hawaii 96813

Marina Associates
1725 Brigantine Blvd.
Atlantic City, New Jersey 08401

HI-Chat-Lem/Iowa-New Orleans Venture
Dauphine and Bienville Streets
New Orleans, Louisiana 70112

Holiday Mills House Venture
115 Meeting Street
Charleston, South Carolina 29401

Harrah's Associates
Mississippi Avenue & Boardwalk
Atlantic City, New Jersey

HI-Thomas Circle Venture
3742 Lamar Avenue
Memphis, Tennessee 38195

HI/JC Venture
300 Poydras Street
New Orleans, Louisiana 70130

HI-C Street Management Venture
3742 Lamar Ave.
Memphis, Tennessee 38195

Holiday Inn-Crystal City
1401 S. Eads St.
Arlington, Virginia 22202

APPENDIX B

Respondents' Statement of The Case
And The Facts To The
Nevada Supreme Court

A. NATURE OF CASE

Nada filed her Third Amended Complaint on April 3, 1981 (Vol. IV 1056-1084). Nada in her brief refers to six separate counts or claims (AOB, p. 2). An analysis of the complaint reveals that there are five separate claims which can be characterized as follows:

(1) Tortious breach of contract;

(2) Unfair competition;

(3) Defamation;

(4) Tortious interference with prospective business advantage;[5] and

(5) Misrepresentation.[6]

B. DISPOSITION

The case proceeded to trial before a jury on the Third Amended Complaint. At the conclusion of the plaintiff's case, the court dismissed Dixon pursuant to NRCP 41(b). At the conclusion of the case, the court dismissed Sheppard and Contois and the claims of tortious breach of contract, unfair competition and defamation pursuant to NRCP 50(a). The dismissals were proper. The other

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[5] The claims of tortious interference with prospective business advantage and misrepresentation were submitted to the jury.

[6] The Opening Brief describes this claim as false and fraudulent representations. For ease of discussion, this claim will be referred to as "misrepresentation."

claims were submitted to the jury together with an instruction as to punitive damages. The jury returned a unanimous verdict in favor of the respondents. (Vol. IX RT 1116-1117).

C. APPELLANT'S STATEMENT OF THE CASE

The appellant's statement of the case in her opening brief contains a number of inaccurate, incomplete, or misleading statements as to the record on appeal which warrant a separate discussion.[7] The misstatements are as follows:

(1) Nada states that she filed a First, Second and Third Amended Complaint against Holiday, Smith and others. (AOB, p. 1).

Holiday was not a party defendant in the First Complaint (Vol. I 1-8, 128-139).

Smith was not a named defendant in the Second Amended Complaint (Vol. III 667-679). Nor was he a named defendant in the Third Amended Complaint. (Vol. IV 1056-1084).

(2) Nada states that Harrah's Club and Harrah's merged with Holiday (AOB, p. 2).

The record reflects a merger agreement between Harrah's and Holiday, not Harrah's Club (Vol. III 800-818).

(3) Nada asserts that the premises were leased to her by Harrah's and Harrah's Club (AOB, p. 2).

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[7] Other inaccuracies are found in appellant's brief which will be discussed later.

The record reflects that each lease agreement was executed solely by Harrah's Club (Exhibits "D", "E", "G", "I", and "J"). Harrah's is a separate corporation from Harrah's Club (Vol. VIII RT 582-585), and not a party to the leases.

(4) Nada states that the defendants filed their answer to the Third Amended Complaint (AOB, p. 2).

While technically the statement is accurate, it is misleading in that on page 1 of her brief she identifies Smith as a party defendant. Smith was not a defendant and did not file an answer to that complaint.

(5) Nada states that the defendants moved for a directed verdict at the close of the case pursuant to NRCP 50(a). (AOB, p. 3).

This is incorrect. Smith did not seek a directed verdict. He was dismissed from the action before the trial commenced. (Vol. III 654-655, 683). Dixon did not seek a directed verdict at the close of the case. Dixon was dismissed at the conclusion of the plaintiff's case pursuant to NRCP 41(b). (Vol. VIII RT 883:29-884:1, 891:10).

(6) Nada states that the court dismissed Dixon, Smith and others referring this Court to RT 1002 and Vol. V 1340-45.[8] (AOB, p. 3). This is not true. Page 1002 of the reporter's transcript does not mention or identify either Dixon or Smith.

The Order and Judgment of Dismissal found at Vol. V 1340-1342, is a dismissal as to Dixon. That order does

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[8] It is suggested by the brief that both Dixon and Smith were dismissed pursuant to NRCP 50(a). The inaccuracy of this suggestion has previously been discussed.

not mention or concern Smith. The order found at Vol. V 1343-1345 involves neither Dixon nor Smith.

IV.

STATEMENT OF FACTS

A. INTRODUCTION

There were material issues of facts submitted to the jury. The evidence presented by the appellant and respondents on these issues was diametrically opposed.

Appellant's Statement of Facts fails to identify those material issues, which were in dispute. Nor does she recite the testimony of any other witness which was inconsistent with hers. (AOB, pp. 4-22). It should be noted that (1) the facts recited by Nada are for the most part based upon her testimony, and (2) references are made by Nada as to what various respondents said, but this information on many occasions is not based upon what Dyer, Sheppard, Stevens or Poore testified to, but *what Nada testified they said.* (*Ibid.*) Nada's testimony on material issues was not consistent with the actual testimony of the respondents.

The statement of facts should be complete. The material issues in dispute and the inconsistent testimony should be identified. The incompleteness of Nada's facts requires a detailed discussion of the facts by the respondents.

B. THE CONTRACT

Nada has asserted a claim of tortious breach of contract. The contract in issue was a 1978 lease. That contract was not breached by the respondents.

The subject matter underlying this action was a leasehold interest in the Byington Building, located at the corner of Second and Virginia Streets in downtown Reno. (Vol. VII 130-132; Exhibit "I").

The Byington Building was owned by the heirs of the Byington Estate and was leased to Harrah's Club[9] in 1958 for a 20-year term. (Vol. VII 153:17-30, 256-259; Exhibit "R").

1968 Lease

A portion of the Byington Building was initially sublet by Harrah's to Nada and her late husband[10] by a lease dated January 16, 1968, ("1968 Lease") (Exhibit "D".

The 1968 Lease was for a 5-year term commencing February 1, 1968 and ending January 31, 1973, "unless sooner terminated as hereinafter provided" (Exhibit "D", para. 2). Two methods of termination were reserved to Harrah's by the terms of this lease: (1) Upon 15 days written notice in the event of default in payment of rent or the performance of obligations on the part of Nada (*Id.*, para. 19), and (2) upon 90 days written notice by Harrah's (*Id.*, para. 24).[11]

The cancellation clause provided:

> "The Lessor shall have the option to cancel this Lease upon ninety (90) days' written notice to the Lessees."

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[9] Hereinafter referred to as Harrah's unless otherwise indicated.

[10] Mr. Aleuvich died on October 16, 1971, (Vol. VII RT 158). The lessees will be referred to as Nada.

[11] Hereinafter referred to as the "cancellation clause."

This clause is the focus of this action. The cancellation clause is clear, unambiguous, unconditional and absolute. While Nada contended at the trial and now asserts on appeal that the cancellation clause was conditional, i. e., the option to cancel could only be exercised if she were a bad tenant or if Harrah's intended to use the premises for unrestricted gaming (AOB, pp. 10-15), the 1968 Lease contains no such limitations or conditions. (Exhibit "D").

It was contemplated by the parties that Nada intended to make certain initial alterations and permanent improvements to the premises (*Id.*, para. 15). In the event the option to cancel was exercised by Harrah's, Harrah's was to pay to Nada the unamortized portion of the initial improvements, based upon the number of months remaining under the lease. (*Id.*, para. 24). No similar provision is found in the lease if the lease were cancelled due to default. (Exhibit "D").

2. The 1970 First Amendment to 1968 Lease

The 1968 Lease was amended on February 24, 1970, ("1970 First Amendment") (Exhibit "E"). Under the terms of the 1970 First Amendment, Nada leased additional space in the Byington Building (*Id.*, para. 1). With reference to the additional space, it was contemplated that Nada would make initial alterations and improvements. Further, as to such expenditures, it was provided that if Harrah's "exercised its privilege to cancel the lease" as provided in paragraph 24 of the 1968 Lease, Harrah's would repay to Nada the unamortized portion of such costs, but if the lease were "terminated for any cause" except cancellation under paragraph 24, Harrah's would

not be obligated to repay to Nada the unamortized costs. (*Id.*, para. 3).

The cancellation clause was not modified by the 1970 First Amendment. (Exhibit "E").

The 1968 Lease and 1970 First Amendment clearly demonstrate that Harrah's had the unconditional right to cancel the lease on 90 days' notice with or without any reason, but if Harrah's did so, it would have to repay to Nada the unamortized costs for initial improvements. On the other hand, Harrah's also had the right to cancel "for cause" under the Default clause (*Id.*, para. 19) on 15 days' notice (e. g., if Nada was a bad tenant). If the cancellation were for cause, Harrah's would *not* be obligated to repay to Nada any of the costs for initial improvements. The manifest fairness and purpose of the distinction is obvious.

3. 1973 Lease

The 1968 Lease provided that if Nada desired to renew her lease with Harrah's, she was to give Harrah's a notice of "intent to seek renewal" not less than 90 days before the expiration of the term of the 1968 Lease. If Harrah's agreed to a renewal, the parties were to negotiate the terms of the renewal, which was to be reduced to writing. (Exhibit "D", para. 32).

On September 27, 1972, Nada notified Harrah's of her intent to renew the lease for the Byington Building premises. (Exhibit "F").

Thereafter, Harrah's relet to Nada[12] the lower level

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[12]Nada is the only lessee, Mr. Aluevich having died on October 16, 1971.

of the Byington Building by a lease dated March 1, 1973 ("1973 Lease") (Exhibit "G"). The term of the 1973 Lease was 5 years, commencing March 1, 1973 and ending February 28, 1978, "unless sooner terminated as hereinafter provided." (*Id.*, para. 2).

Like the 1968 Lease, the 1973 Lease contained a cancellation clause which provided in part:

> "24. *Cancellation.* The Lessor shall have the option to cancel this Lease upon ninety (90) days' written notice to the Lessee." (*Id.*, para. 24).[13]

The cancellation clause is absolute and unconditional. The language is identical to the language which appeared in the 1968 Lease.[14]

The 1973 Lease generally contained the same language as the 1968 Lease. The language relative to alterations and renewal was modified somewhat. It was contemplated that Nada intended to make certain alterations and improvements at the commencement of the lease term. Those improvements had to be made not later than December 31, 1973. (*Id.*, para. 15). As to such alterations or improvements, paragraph 24 provided that Harrah's would pay to Nada the unamortized costs if Harrah's exercised the option to cancel the 1973 Lease. As in the 1968 Lease, if the lease was terminated for any cause except cancellation under paragraph 24, Nada was not entitled to be paid for the unamortized costs of alterations or improvements. (*Id.*, para. 24).

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[13]Hereinafter referred to as the "cancellation clause."

[14]The word "Lessees" was changed to "Lessee."

Again, as in the case of the 1968 Lease, the 1973 Lease did not impose any conditions or restrictions on Harrah's as to the exercise of the option to cancel the 1973 Lease. Specifically, it did not provide that the cancellation clause could only be exercised if Nada ware (sic) a bad tenant or if Harrah's intended to use the premises for gaming. (Exhibit "F").

As to renewal, the time for giving notice of intent to seek renewal was extended to 6 months. In all other respects, the renewal language was identical to that in the 1968 Lease (Exhibit "F", para. 32; Exhibit "D", para. 32).

4. 1978 Lease Renewal

On June 30, 1977, Nada notified Harrah's of her intent to renew the 1973 Lease in accordance with paragraph 32 of that Lease (Exhibit "H").

Thereafter, Harrah's relet the same premises to Nada as evidenced by a Lease Renewal dated March 1, 1978. ("1978 Lease Renewal") (Exhibit "I"). The 1978 Lease Renewal provided that the 1973 Lease was renewed for a term of 5 years, commencing on March 1, 1978 and ending on February 28, 1983, on the "same terms, conditions, covenants, and agreements" as contained in the 1973 Lease, except as modified by the 1978 Lease Renewal. (Exhibit "I", para. 2). A copy of the 1973 Lease was attached to the 1978 Lease Renewal as Exhibit "A". (*Id.*, para. 1).

The pertinent modifications were:

(1) Rental was to be based on a percentage of gross sales rather than a fixed monthly rental. (*Id.*, para. 3);

(2) Alterations or improvements by Nada were not contemplated. No alterations or improvements were to

be made by Nada without first obtaining the written consent of Harrah's. (*Id.*, para. 5).

(3) If Harrah's cancelled the lease as provided in paragraph 24, Harrah's would pay to Nada the unamortized cost of approved leasehold improvements made during the renewal term as provided at paragraph 5 of the 1978 Lease Renewal. Again, if the 1978 Lease Renewal was terminated other than pursuant to paragraph 24, Nada was not entitled to be paid such unamortized lease improvements. (*Id.*, para. 6).

(4) As to renewal, it was provided that Nada "shall have no option to renew the Lease for any further term." (*Id.*, para. 8).

The cancellation clause remained intact and still provided: "The Lessor shall have the option to cancel this Lease upon ninety (90) days' written notice to the Lessee." (Exhibits "I", "G"). No conditions or limitations were imposed as to the exercise of the cancellation clause. (*Ibid.*)

The 1978 Lease Renewal contained an error as to the gross sales minimum base, which was corrected by a Modification of Lease dated May 31, 1978. (Exhibit "J").

On October 2, 1978, pursuant to 1978 Lease Renewal, Harrah's delivered to Nada a Notice of Cancellation[15] (Vol. VII RT 185; Exhibit "L"), which provided:

> "Notice is hereby given that the Lease between you as Lessee and Harrah's Club, a Nevada corporation, as Lessor dated March 1, 1973, as renewed by

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[15]Hereinafter referred to as "cancellation notice."

'Lease Renewal' dated March 1, 1978, and as amended by 'Modification of Lease' dated May 31, 1978, shall be cancelled pursuant to Section 24 thereof pertaining to the rights of cancellation of the parties to the Lease, effective January 1, 1979. The Lease is for demised premises located in the Byington Building, Second and Virginia Streets, Reno, Nevada." (Exhibit "L").

The effective date of the cancellation was to be January 1, 1979. However, thereafter, on December 11, 1978, to accommodate Nada's business requirements, the effective date of cancellation was extended by Harrah's to February 28, 1979. (Exhibit "M"; Vol. VII RT 192).

On February 28, 1979, Nada vacated the Byington Building. (See Vol. VII RT 151.)

Nada asserted that respondents breached the 1978 Lease Renewal by exercising the cancellation clause on October 2, 1978. This assertion is based upon parol evidence inconsistent with the plain and clear language of the contract. Parol evidence may not be introduced to modify the 1978 Lease Renewal, thus, the directed verdict by the trial court on the breach of contract issue was proper.

C. THE CLAIM OF MISREPRESENTATION

The issue of misrepresentation was submitted to the jury. There were numerous genuine issues as to material facts, which disputed facts were not identified in Navada's brief. The jury resolved those issues in favor of the respondents.

1. The 1968 Lease

Nada and her late husband operated a business under the name of Luke's Gift Shoppe and Luke's Nevada Photo

("Luke's"). Luke's was relocated in the Byington Building in 1968 after Nada and Harrah's entered into the 1968 Lease (Vol. VII RT 152).

In the summer of 1967, Nada contacted Dyer relative to leasing the Byington Building (Vol. VII RT 153). At that time Dyer was vice-president of real estate and finance of Harrah's, and was authorized to negotiate leases on behalf of Harrah's (Vol. VII RT 255). In 1975 Dyer became president of Harrah's (*Id.*, RT 281), which title he held until February, 1980 (Vol. VIII RT 637).

Nada, a lawyer since 1950 (Vol. VII RT 150-151), possessed expertise in the field of real estate, having drafted leases, documents and deeds of trusts, and having been involved in business and real estate litigation, and appellate practice, and she was also an experienced businesswoman (Vol. X 1-10).

Nada negotiated the 1968 Lease with Dyer. Nada asserts that Dyer told her there would be a cancellation clause and further represented that the cancellation clause would *only* be exercised if she were a bad tenant or if Harrah's intended to use the premises for unrestricted gaming (AOB, pp. 10, 12, 29, 30; Vol. VII RT 173-174). While Nada did so testify at the trial, her brief fails to mention that Dyer denied ever making such statements.

Dyer testified that before the 1968 Lease was entered into he did *not* tell Nada that the cancellation clause would only be exercised (1) if she were a bad tenant, or (2) if Harrah's could get unlimited gaming at that location (Vol. VII RT 307:23-308:5, 339:17-23). Further, on examination by Nada, he testified as follows:

"Q. You only told me, did you not, sir, that the only reason that the cancellation clause was in there was if I were a bad tenant?

A. *No.*

Q. And if you could put in unlimited gaming in there?

A. *No.*

Q. You didn't say that?

A. *Absolutely not.*

Q. *You deny that?*

A. *I do.*" (Vol. VII RT 332:8-17, emphasis added).

In her brief, Nada states that Dyer advised her that the cancellation clause was in the lease for "one reason", that if she ran a junk shop, the lease would be cancelled, referring this Court to her own testimony and an incomplete portion of Dyer's deposition (AOB, pp. 10-11). Nada has again failed to provide this Court with the complete testimony of Dyer on this subject.

Dyer testified that was *one* of the purposes for the cancellation clause (Vol. VII RT 268:3-13), but he also testified there were other reasons. Harrah's wanted to maintain flexibility for future control or use of the premises (*Id.*, 316:3-320:17).

Nada refers to a *portion* of the testimony of Dyer taken from his deposition (AOB, pp. 10-11), asserting that Dyer testified that only one reason existed for the cancellation clause. Unfortunately, Nada has again failed to provide the court with Dyer's complete testimony as it appeared in the deposition and was presented at the trial.

Nada refers to the deposition testimony of Dyer[16] attempting to assert that the cancellation clause would only be exercised if she were a bad tenant. But she failed to inform this Court that:

(1) When she asked Dyer if that was his testimony when his deposition was taken, she would not allow him to explain that it was not all of his testimony on the subject (Vol. VII RT 269:27-270:20).

(2) Following the recited testimony from the deposition, Dyer stated there were other reasons, including maintaining flexibility with reference to the use of the property (*Id.*, RT 270:21-271:6) and for a possible exchange of the property for the First National Bank property, contiguous to Harrah's, so that Harrah's could expand to the Bank property (*Id.*, 270-272).

(3) When she asked Dyer if only two reasons were given in the deposition, to wit: If she were a bad tenant, or if the Bank were placed there, Dyer responded, "No" (*Id.*, 272:15-22).

(4) It was not until respondents' cross-examination of Dyer that the complete testimony from the deposition was presented, which consisted of the answers given by Dyer immediately following the statements quoted by Nada in her brief at pages 10 and 11 (*Id.*, RT 316:3-320:17). In the balance of the deposition testimony, Dyer stated Harrah's wanted flexibility to use the premises for gaming or something else, or future use, and concluded by saying: "But the point I'm trying to make is that we want

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[16]The testimony commences at line 11, page 32 of the deposition (Vol. VII RT 316:3-320:17).

the cancellation clause, wanted it in your building and other places, in case we have a future use and we want to be able to move." (*Id.*, 320:8-12).

Additionally, on examination by Nada, Dyer was asked to explain what he meant by flexibility, and he responded that Harrah's wanted the right to terminate any lease, the right to change a tenant, put in a different business, or to expand gaming (*Id.*, 330:3-14). In summary he testified: "I am saying that we wanted the flexibility in all of our leases to control our properties and do what we wanted with them, not knowing, perhaps, what a future use might be." (*Id.*, 336:7-10).

2. Cancellation Clause

The unconditional cancellation clause and its purpose had an historical basis. The Byington Building was leased by Harrah's from the Byington Estate on December 30, 1958 ("Byington Lease"). The term of the lease was 20 years, expiring on December 31, 1978. (Exhibit "R").

Part of the Byington Building leased to Nada in 1968 had been previously leased to Folk & Campbell under a lease commencing September 1, 1959 ("1959 Lease") (Exhibit 6a), and a lease dated November 6, 1964 ("1964 Lease") (Exhibit 6b). Both leases were prepared by Dixon, as counsel for Harrah's. Both leases contained cancellation clauses, which were also prepared by Dixon and which read as follows (Vol. VIII 620:28-622:5): "This Sub-Lease may be terminated by Lessor by ninety (90) days' written notice to Lessees." (Exhibit 6a, para. 22, Exhibit 6b, para. 22).

Dixon also prepared the 1968 Lease and the cancellation clause found at paragraph 24 (Vol. VIII RT 622). Before the 1968 Lease was signed, Dixon discussed the provisions of paragraph 24 with Nada (*Id.*, 623:23-28). Dixon had been instructed to prepare the lease with a cancellation clause. He was concerned that Nada would be putting improvements on the premises, so he talked to Nada concerning an amortization clause. Dixon explained that if Harrah's cancelled her lease, she would be protected by getting back the unamortized costs. Thereafter, the lease was signed by Nada, with the cancellation clause and the amortization clause. (*Id.*, 623:23-627:4).

Dixon explained that Mr. Harrah was not in the leasing business, and he wanted to maintain the freedom to pursue his business purposes, and thus wanted the flexibility to cancel any lease. Harrah's wanted to make sure that it could cancel Nada's lease as it could have cancelled Folk & Campbell's, with or without any reason. The purpose of the cancellation clause drafted by Dixon was to reserve to Harrah's the unconditional right to cancel the lease on 90 day's written notice. (Vol. III RT 632-635).

3. 1977 Negotiations

On June 30, 1977, Nada gave notice to Harrah's of her intention to renew the 1973 Lease. Thereafter, Nada met with George Poore on September 9, 1977 (Vol. VII RT 168). Poore was the Director of Purchasing and Materials Management for Harrah's (*Id.*, RT 360). As to the meeting of September 9, 1977, Nada in her brief asserts that Poore told her that Harrah's was considering putting in its own gift shop in the Byington Building, that Poore questioned her about merchandising of Lukes; that Poore asked her for her gross and net revenue figures for

Luke's; and that she refused to provide the figures (AOB, p. 8). The foregoing is based upon Nada's testimony, not Poore's.

Poore testified that his supervisor had informed him that Nada's lease was to expire. Poore was instructed to evaluate the space on the corner and to make a recommendation as to the operating future of the location. (Vol. VII RT 364, 367-368). He was also instructed to contact Nada and to start negotiating a new lease. (*Id.*, RT 367). On the meeting of September 9, 1977, Poore informed Nada her lease was about to expire and that Harrah's was considering the corner for several enterprises, including a bank, an ice cream store, McDonalds, a liquor store, a gift shop, without identifying any operator, and other possibilities. (*Id.*, 368-369). Poore discussed with Nada that Harrah's "main objective was to establish the market value of the *space*", other people were interested in the space, the going rental rate for gift shops was "10% of the gross with a per square foot minimum," Harrah's needed to know Nada's gross to evaluate whether the space for a gift shop versus another type business would be in the best interest of Harrah's, and the space was under consideration for other uses but no definite direction had been set. (Exhibit "Y", emphasis added.) Nada refused to provide her gross figures. (Vol. II RT 369). Nada's lease was to expire on February 28, 1978, unless renewed. (Exhibit "G").

On September 30, 1977, Nada again talked to Poore concerning a new lease, at which time Poore again requested her gross figures. (Vol. VII RT 176, 376). Poore stated that the importance of Nada's gross figures was to establish a lease value for the corner and to establish a minimum rent for Nada's new lease. (Vol. VII RT 373:

19-22). Nada refused to provide the figures and said she was going to see Dyer. (*Id.*, RT 177, 377).

On October 10, 1977, Nada met with Dyer. (*Id.*, RT 177). Dyer stated that he wanted to renew the lease, the only problem being rent. (*Id.*, RT 290). Thereafter, Nada again met with Poore on November 9, 1977. (*Id.*, RT 377). Don Stevens, the treasurer and controller of Harrah's was also present at that meeting. (*Id.*, RT 178, 179, 377).

4. Harrah's 1977 Projections

Stevens monitored all leases. He knew that Nada's lease was due for renewal. As controller of Harrah's, he thought that he should give his input as to the possibilities for the Byington corner. (Vol. VII RT 378). Stevens prepared an analysis of several possible alternatives for utilizing the space on the corner.[17] (Exhibit "V" and Exhibit "W").

Nada asserts that the purpose of Stevens' analysis as contained in the 1977 Projections was to take over Luke's and when she met with Stevens, she did not know Stevens was making projections. (AOB, pp. 12, 13).

To the contrary, the record reflects:

(1) Nada testifies she learned of the 1977 Projections from Stevens on November 9, 1977 (Vol. VII RT 231:7-24).

(2) The 1977 Projections were prepared by Stevens on his own and were his forecast as to the potential of the corner (Vol. VII RT 437, Vol. VIII RT 456).

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[17]The analysis is set forth in a memo dated October 27, 1977 (Exhibit "V"), which was revised on November 8, 1977 (Exhibit "W"), the day before Nada met with Stevens. The analysis will hereinafter be referred to as the "1977 Projections."

(3) The projections related to the corner or the space in contrast to Luke's (Vol. VIII RT 448), and were based upon operations within Harrah's (Vol. VII, RT 295-296; Exhibits "V", "W").

(4) Stevens recommended that Nada's lease not be renewed and that Harrah's maximize its return by putting a retail establishment operated by Harrah's on the corner. (Vol. VIII RT 448-452, 471-473, 480). It was not his concern as to what form the establishment took. Any decision not to renew the lease or as to what was to be placed on the corner, was to be made by other management people. (*Id.*, RT 472, 479-480, 482; Exhibit "Z").

(5) At the meeting of November 9, 1977, Nada told Stevens her margin on the camera store as opposed to the gift shop was low and she could not afford to pay a rent based on 10% of gross. (Vol. VII RT 224, Exhibit "Z"). Stevens believed a lease of the premises should be based on 10% of revenue (Vol. VIII RT 461). Because of Nada's statement, Stevens requested gross and net figures for a proper evaluation of the potential lease. (*Id.*, RT 461-462). Nada again refused to provide her figures, and said she would talk to Dyer and Mr. Harrah. (Exhibit "Z").

(6) Stevens' recommendation not to renew the lease was not accepted by management (Vol. VIII RT 480), and after the lease was renewed, he did not participate in the decision to cancel the 1978 Lease Renewal (*Id.*, RT 467).

The record fails to reflect any other involvement on the part of Stevens between the meeting of November 9, 1977, and the renewal of Nada's lease in March of 1978.

5. Representation of Poore

While Poore was provided with copies of the 1977 Projections, he did not work with Stevens in preparing the projections and did not know why they were being prepared (Vol. VII RT 381).

After November 9, 1977, Poore told Nada he needed her revenue figures in order to complete the evaluation of the corner and that a minimum rent could not be set nor could the lease be renewed without them (*Id.*, RT 389-391). Nada told Poore she would get back to him in a couple of weeks (*Id.*, RT 391).

Thereafter, Nada did get back to Poore. Nada asserts that during this subsequent discussion Poore made certain misrepresentations relative to the purpose and exercise of the cancellation clause and the use of her gross revenue figures. (AOB, pp. 11, 12, 14, 15, 28, 29, 30). Again, Nada's brief fails to mention that Poore's testimony on these matters was different from Nada's.

Furthermore, the quotations appearing at page 11 of Nada's brief concerning Poore are taken out of context and do not accurately represent either the record or Poore's testimony. There, Nada states: "Likewise in his *deposition* on November 5, 1979, defendant Poore was asked by plaintiff who was acting as her own counsel." (Emphasis added.) Following this statement she quotes a question, referring the court to page 75 of the deposition and to page 393, lines 13-14 of the transcript. Following the question she quotes an answer suggesting that this was the answer Poore gave to the previous question.

The record fails to identify the quoted question as having come from page 75 of Poore's deposition. As a matter of fact, the record does not even reflect that any

portion of page 75 of Poore's deposition was admitted into evidence (Vol. VII, RT 383:13-15).

The quoted question was, in fact, asked by Nada during the trial, but the answer to the question of whether Harrah's only intended to be bound for 90 days under the lease was not the one quoted in Nada's brief, and further, was not taken from Poore's deposition (AOB, p. 11). The answer given to the question was: "That's what you were concerned about, that you were only signing a 90 day lease, yes." (Vol. VII RT 383:16-17) Nada again asked a similar question, and Poore responded: "I knew it, and you knew it" (*Id.*, 393:18-21).

The quoted answer appearing at the bottom of page 11 of Nada's brief is also misleading. Nada refers this Court to page 394 of the transcript. This Court should note that the record reflects that Poore did *not* testify as quoted by Nada. (Vol. VII RT 394) The record reflects that commencing at line 18 of page 394 an argument ensued between counsel as to whether Nada was reading Poore's *complete* answer as taken from the deposition. The complete answer when finally presented to the jury reflected that Poore testified:

> "*I'm not sure.* It was in there for the reason that I said. It was in there because—for the protection of Harrah's is the only reason that I know of that it was in there. ***But whether that 90 day clause has additional information to it, I would have to read the lease. Other than what it says in the lease I didn't make any representations to her other than what the lease says.***[18]
>
> (Vol. VII RT 395:10-396:9).

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[18]The portion of the answer omitted by Nada at page 11 of her brief is underlined.

As to Poore's discussion with Nada after November 9, 1977, his testimony differs from Nada's. Following the meeting of November 9, 1977, Poore had a telephone conversation during the early part of December of 1977, at which time she provided Poore with her gross revenue figures. (Vol. VII RT 419:6-422:12, Exhibit "S". Poore immediately called his supervisor, George Drews ("Drews") and reported the figures to him. Drews called back and told Poore to proceed with the lease based upon a 10% of gross revenue and a minimum rental. Poore notified Nada of Harrah's decision (*Id.*, RT 422-423, 361).

Nada requested that the 90-day cancellation clause not be included in the new lease. Poore informed her that he would take up her request with Mr. Franklin, Harrah's in-house legal counsel. Poore reported the request to Franklin, who said "No, its Harrah's policy to have cancellation clauses in their leases." (*Id.*, RT 409: 14-15). Poore thereafter informed Nada that the cancellation clause would not be removed from the lease. (*Id.*, RT 392-393; 409)

Poore's testimony also differs from Nada's as to whether any representations were made by him to her concerning the cancellation clause before the 1978 Lease Renewal was signed. Poore testified Nada knew she was only signing a 90-day lease, and that he did not assure Nada the cancellation clause would only be exercised under the same conditions as the old lease. (*Id.*, RT 393)

Poore made no representations to Nada concerning the cancellation clause or when it would be exercised.

(*Id.*, RT 408-409). While Poore had a personal opinion as to why the cancellation clause was included in the 1978 Renewal Lease (*Id.*, RT 407), he explained that the "reason for the cancellation clause" came through the legal department who prepared the lease, and that he made no decisions in regards to the cancellation clause (*Id.*, RT 412-413, 405-408).

As to any representation as to Harrah's exercising the cancellation, Poore said: "I couldn't make a statement as to when or why it would be exercised. This is a right that Harrah's had in the lease. As to when or why it would or would not exercise it, I had no way of judging that." (*Id.*, RT 406:13-16)

After talking to Nada, the lease was prepared by Harrah's counsel with the cancellation clause (Vol. VII RT 423; Exhibit "I"). After the lease was signed, Poore had no further involvement. He did not participate in the decision to cancel the 1978 Lease Renewal and did not learn of the cancellation until he read of it in the newspaper after October 2, 1978. (Vol. VII RT 424)

6. Renewal and Cancellation

Stevens had recommended in November, 1977, that the 1973 Lease, which was due to expire on February 28, 1978, not be renewed. (Vol. VIII RT 480).

Stevens' recommendations were rejected by Dyer and the lease with Nada was renewed. Dyer explained that the decisions as to whether Harrah's would renew the lease or place a gift shop at the location in 1977 were his, Harrah's did not intend to put a gift shop at that location at that time, and that the lease with Nada was renewed. (Vol. VII, RT 290-291, 297, 308-309).

Nada quotes statements of Drews and Andreotti to the effect that in 1977 they did not know why the 1973 Lease was renewed in 1978. (AOB, pp. 13-14). She suggests that such answers imply something improper. She fails to mention, however, that the record is barren of any evidence that either Drews or Andreotti participated in the decision to renew the lease. Nor is it mentioned that Dyer *alone* made that decision. (Vol. II, RT. 290-291, 297, 308-309).

The 1978 Lease Renewal was signed on March 1, 1978. On October 2, 1978, Harrah's delivered to Nada a notice of cancellation of the 1978 Lease Renewal. (Exhibit "L"). The decision to cancel was made by Dyer and only Dyer. While Nada states that the decision was made by the Board (AOB, p. 16), Dyer stated that Harrah's Board and the other defendants were not involved in the decision. (Vol. VII RT 288, 297, 352). Dyer explained his reasons for cancelling the lease to be:

(1) The pretax earnings had dropped substantially in the period between March, 1978 and September, 1978, in comparison to the same period of time in 1977 (Vol. VII RT 308-312; 342).

(2) Dyer asked Stevens to prepare a schedule of Harrah's earnings for the period from March, 1978 through September, 1978 (*Ibid.*) (Exhibit 4).

(3) Exhibit 4 showed that the earnings had dropped as follows: March, 1%; April, 44%; May, 25%; June, 24%; July, 11%; August, 2%; and September, 17%. (Vol. VII RT 311).

(4) Because of the drop in earnings and in an effort to increase earnings, Dyer in July, 1978, asked his people

to prepare a projection on the Byington location. A projection was prepared by George Akmon on July 27, 1978 (Exhibit "DD") ("1978 Projection").

(5) The 1978 Projection used the same figures recited in the 1977 Projections prepared by Harrah's, but also added gaming. The pretax figures for the slot machines alone was $800,000. The after-tax profit for slots, a gift shop and pinball games was $600,000. (Vol. VII RT 312).

(6) Based upon the reduced earnings and the projected earnings, Dyer believed it in the best interest of the Harrah's shareholders to cancel the lease, which he did on October 2, 1978 (*Id.*, RT 312, 349).

Nada asserts in her brief that Harrah's relied upon her gross revenue figures in preparing its 1978 Projections. That assertion is incorrect and not supported by the record.

Dyer's decision to terminate the lease was made on Harrah's projections, not Nada's gross revenue figures (Vol. VII RT 340). The first time he saw Nada's monthly figures was after the termination (*Id.*, 353, 356). The 1977 Projections were also not based on Nada's figures (*Id.*, 350).

There is no evidence in the record that any projection prepared by either Akmon or Stevens was based upon Nada's figures.

Nada suggests that Drews reviewed Nada's revenue figures to determine whether the lease should be cancelled (AOB, p. 14). Drews, however, testified that Harrah's did not need Nada's figures, because Harrah's had oper-

ated gift shops at other locations (Vol. VIII RT 675-676), and that he had never seen Nada's monthly figures (*Id.*, RT 677).

Nada also argues with the evidence as to whether Harrah's earnings were down from March through September, 1978 (AOB, p. 19). She refers the court to Exhibit "T", which is an annual report dated September 15, 1978. She fails to mention, however, that the annual report covered the fiscal year of July 1, 1977 to June 30, 1978, the fourth quarter was for April, May and June, 1978, the annual report did not include the months of July, August, and September of 1978, and Dyer's decision to cancel was based upon the months of March through September, 1978, not the annual report. (Vol. VII RT 309, 311).

D. SHEPPARD'S ROLE

After deciding to cancel the 1978 Lease Renewal, Dyer requested Sheppard to prepare the cancellation notice and to deliver it to Nada on October 2, 1978, which he did. (Vol. VII RT 275, 299-300, Exhibit "L").

In December, 1979, Dyer became concerned that Nada was not moving.[19] He told Sheppard to contact Nada to see if he could help. (Vol. VII RT 304-305). Sheppard contacted Nada and said that he noticed that she was not selling her inventory. Sheppard offered to buy her inventory and other items. Nada asked Sheppard to renew the lease. Sheppard said he would have to talk to Dyer and get back to her. When he called back, he told her

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[19]Nada was to vacate the premises by January 1, 1979.

Harrah's would not renew the lease, but Harrah's would give her more time to get out if it would help. (*Id.*, RT 190-192). Thereafter, Sheppard sent Nada a letter extending the date to vacate from January 1, 1979 to February 28, 1979. (Exhibit "M").

The foregoing is Sheppard's sole involvement in this case.

E. "THE STORE"

1. Merchandising and Inventory

Nada operated Luke's in the Byington Building until her lease expired on February 28, 1979. The operation included a souvenir-gift shop and a camera shop. (AOB, pp. 4, 5, 16).

In the latter part of February, 1979, Luke's camera shop was moved to 4966 South Virginia (Vol. VIII RT 682), and was still located there as of the time of the trial (Vol. VII RT 196-197).

On May 9, 1979, Harrah's opened a gift shop at the Byington Building premises, operating under the business name of "The Store." (Vol. VIII RT 485, 642). Dave Wirshing ("Wirshing"), customer services manager for Harrah's, became the manager of The Store (*Id.*, RT 483-484).

Wirshing had recommended that the location be used as a combination slot carousel, gift shop and teen arcade. (*Id.*, RT 510). The operation of The Store included slot machines, a gift shop, a leather shop and a stationery outlet. The type of merchandise sold included jewelry, decorative accessories, stationery, souvenirs, T-shirts, toys,

porcelain, sundries, tobacco, beverages and liquor, photography film and accessories, publications and leather products. (Vol. VII RT 331; Vol. VIII RT 497; Vol. IX RT 903-908; Exhibit "13").

Wirshing was responsible for the exterior and interior layout of, (*Id.*, RT 513), and the merchandise to be carried in The Store. (*Id.*, RT 511).

The emphasis of The Store was to be gift items rather than souvenirs (*Id.*, RT 486). Harrah's had been in the gift shop business an estimated 25 years (*Id.*, RT 511). The merchandise placed in The Store was the same merchandise that Harrah's had been previously selling at its other locations: Tahoe Gift Shop, Tahoe Souvenir Shop, Tahoe Premium Center, the Sundry Shop at Lake Tahoe, the Reno Gift and Premium Centers, the Infirmational Center in Reno and at Harrah's Automobile Collection (*Ibid.*).

In making decisions as to which items would be placed in The Store, Wirshing worked closely with the Buyer for Harrah's, Gloria Julius ("Julius"). (Vol. IX RT 898). Julius was responsible for purchasing for the retail outlets of Harrah's, which included the Reno and Tahoe shops and Harrah's Automobile Collection. (*Id.*, RT 896-897). It was Harrah's desire to continue with the lines that had done well in the past, and to create a shop with a pleasant atmosphere, with unique gift items, so that The Store would be a very interesting or memorable place to shop (*Id.*, RT 902). The Store was described as "a Park Avenue Store" by Nada's expert witness Eric Greenlees ("Greenlees"). (Vol. VIII RT 834). Wirshing was un-

familiar with Nada's inventory (Vol. VIII 495, 497), and in setting up The Store, Harrah's relied upon Harrah's prior experience and made no effort to determine Nada's suppliers. (Vol. IX 901-902).

Julius prepared a schedule of the suppliers used by Harrah's before The Store was opened and those used at The Store (Exhibit "12"). That schedule reflected that Harrah's continued to use the same basic suppliers and lines in The Store as it had previously used in its other retail outlets (Exhibit "12"), Vol. IX RT 899-901).

For the trial, Julius also prepared an analysis of the inventory carried by Luke's in comparison to that carried by The Stare (Exhibit "13). The analysis reflected a different emphasis in merchandising between the two establishments. For example, 38% of the inventory of Luke's was classified as souvenirs, while the largest selling item in The Store was jewelry, followed by decorative accessories, which represented over ⅓ of the sales. Souvenirs were 3rd or 4th in sales (Vol. IX RT 912, 903-912, 924-925).

2. The Store's Interior and Exterior

Before The Store was opened, Wirshing contacted Henry Conversano of Oakland, California. Conversano was a designer and decorator who had designed Harrah's Tahoe Hotel and Casino and the remodeling project for Reno Harrah's. Wirshing told Conversano that Harrah's wanted a design and plan for the Byington Building, which would upgrade the location, and that Harrah's wanted the outside of the building to look different. (Vol. III RT 513-514).

Conversano prepared plans relative to the design of the exterior of the building, which were utilized by Harrah's. (Exhibit "9"; Vol. III RT 514-516). The differences are reflected in the photographs which were presented to the jury (Exhibits "14, 15, 16").

As to the interior design and layout of The Store, Wirshing contacted Don Caylor of The Store Equipment Company of Los Angeles. Layout blueprints and drawings were prepared by Caylor relative to the location of fixtures, equipment and gondolas, including the type of gondolas or fixtures (Exhibit "10"), which plans were utilized by Harrah's relative to the interior lawout of The Store. (Vol. VIII RT 516-521).

While Nada suggests that Luke's and The Store were similar, the overwhelming evidence produced on this issue is to the contrary. The design plans of Conversano and Caylor, as well as the photographs, demonstrated clearly the differences. (Exhibits "9, 10, 14, 15, 16"). Additionally, Leif Mack, Nada's manager and Greenlees testified that Luke's and The Store were different.

Mack stated that he had worked for Nada for about 11 years (Vol. VIII, RT 679), and that he was familiar with Luke's and The Store (*Id.*, RT 757-758). He stated as to the exterior, the signs, the color and texture, as well as the window appearances differed. In fact, he stated that there was no question when you looked at The Store, it was not Luke's (*Id.*, RT 758-759). He also described the differences as to the interior, concluding that when you walked through the door of The Store "there was no question in my mind that it is not Luke's." (*Id.*, RT 761, 759-761).

Greenlees, Nada's expert witness, testified that The Store was radically different than Luke's in its merchandising policy; it was radically different in that The Store was a Park Avenue Store and Luke's was "much more folksy, friendlier kind of image"; and the management of The Store was aimed at a much more limited market than Luke's (*Id.*, RT 834-836). Finally, in describing The Store, Greenlees said "it gave me a *dramatically* different impression than what I had remembered Luke's as being operated some four years earlier." (*Id.*, RT 836:5-7, emphasis added).

F. DEFAMATION

Nada asserts she was libeled by Harrah's. Again, her discussion of the facts is incomplete and misleading (AOB, pp. 21, 22, 35, 36).

Nada states "On May 9, 1979, Harrah's issued a *press release* through Robert Contois" referring the court to Exhibit "Q" (AOB, p. 21, emphasis added). Exhibit "Q" is not the press release issued by Harrah's,[20] it is a newspaper article which appeared in the local Reno newspaper[21] (See Exhibit "Q" and Vol. VIII RT 642, 652.) The press release issued by Harrah's is Exhibit "2" (hereinafter referred to as "Harrah's Release"). Nada's comments bounce between the Newspaper Article and Harrah's Release without distinction. (AOB, pp. 21, 22, 35, 36). Yet, as will be demonstrated later, the Newspaper

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[20]The same type of misstatement appears at page 35 of Nada's brief.

[21]The newspaper was the Nevada State Journal. This article will hereinafter be referred to as the "Newspaper Article."

Article, which was not authored by Harrah's, varies in material respects from Harrah's Release. Additionally, neither the Newspaper Article nor Harrah's Release defame Nada. (Exhibits "Q" and "2").

1. Harrah's Press Release

Harrah's prepared a statement dated May 7, 1979 ("Harrah's Release"), through its publicity and advertising department announcing the opening of The Store, which statement was approved by Contois. (Vol. VIII RT 645, 649). Harrah's intention was to inform the public of the opening of a facility at the corner of Second and Virginia Streets, which would be operated by Harrah's under the name "The Store" (*Id.*, 656).

Candy Pearce, Harrah' press relations manager, testified that after Harrah's Release was put together it was approved by management and Harrah's attorneys. She was then assigned as the person at Harrah's who the media could contact to verify information or ask questions. (Vol. IX RT 946-948).

Harrah's Release was delivered to the Reno newspaper. The Newspaper Article appeared in the newspaper 2 days later, and though it differed in many respects from Harrah's Release, Pearce was not contacted in the interim relative to the Newspaper Article or any of the changes. (*Id.*, RT 946-947; Exhibit "2" and Exhibit "Q").

The record is barren of any evidence that Harrah's Release refers to or mentions Nada or Luke's, or that there is anything contained in it which defames Nada or Luke's.

2. The Newspaper Article

The Newspaper Article (Exhibit "Q") was prepared and published by the local newspaper, not by Harrah's. The Newspaper Article was not an accurate and true copy of Harrah's Release, and according to Contois as well as a review of the two exhibits, there were "significant differences." (*Id.*, Vol. VIII RT 644:8-10).

The differences can be summarized as follows:

(1) The Newspaper Article referred to the prior tenant, Luke's, and that the Luke's lease had been cancelled. Harrah's Release did not contain such information. (Vol. VIII RT 653, Exhibits "Q" and "2").

(2) The newspaper quotes Contois as stating that the "giant gaming establishment's new venture into the gift shop business is aimed at upgrading Reno's busiest tourist intersection." No such quotation appears in Harrah's Release. Harrah's Release does not refer to the opening of The Store as a "new venture into the gift shop business," but merely a venture. As previously indicated, Harrah's had been in the gift shop business for 25 years (*Id.*, RT 653-654).

(3) As to Harrah's statement that the venture was aimed at upgrading the corner, Harrah' Release explained that the 3-story building "is undergoing a face lift while the street level is being completely remodeled." No such information is present in the Newspaper Article (*Id.*, RT 654).

(4) Nor does the Newspaper Article mention that The Store would have slot machines, as was mentioned in Harrah's Release (*Id.*, RT 654).

(5) Nor does the Newspaper Article mention that the statements made by Harrah's as contained in the release were based on its "experience with Harrah's gift shops in Reno and Lake Tahoe" and that Harrah's would be "offering the same range of items as we presently do but on a wider selection", as Contois stated in the release (*Id.*, RT 655:4-10).

3. Absence of Defamation

Harrah's Release does not contain any libelous statement as to Nada. The Newspaper Article was neither approved nor authored by Harrah's as published.

The record is also absent evidence of malice in fact. Before delivering Harrah's Press Release to the newspaper, it was approved by legal counsel. There is no evidence in the record that Contois acted maliciously or with ill will, in fact, he stated that he never met Nada until after she sued him. (Vol. VIII RT 651)

The absence of defamation in the Newspaper Article is supported by the testimony of Mack, Nada's manager, who said the article did not contain anything that was "factually false" (Vol. VIII RT 763:6-11). Further, Nada had not lost any business, or business dealings, or suffered any damage to her business reputation as a result of the publication of the Newspaper Article. (*Id.*, 763). There is no evidence of Nada having sustained any special damage by reason of the published Newspaper Article.

APPENDIX C

Petitioner's Issues Presented For Review
To The Nevada Supreme Court

ISSUES PRESENTED FOR REVIEW

The trial court erred in entering its order pursuant to Rule 50(a) for a directed verdict in favor of defendants and against plaintiff at the close of the case on the grounds that there were no general issues as to any material facts as to plaintiff's claims of:

(1) Tortious bad faith breach of contract;

(2) Breach of a fiduciary relationship;

(3) Unfair competition, misappropriation, unjust enrichment;

(4) Defamation;

and dismissing same.

(5) The trial court erred in dismissing Mead Dixon, Robert Contois, Maurice Sheppard and Art Smith as parties defendants.

(6) The trial court committed prujudicial error in instructing the jury on an issue of fact not substantiated by the evidence.

(7) Trial court committed prejudicial error in not instructing the jury on all the theories of plaintiff's case.

(8) The jury verdict is erroneous and not supported by the evidence.